83-158

No. 83-

Office - Supreme Court, U.S
FILED
JUL 30 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

MEMBERS OF THE JAMESTOWN SCHOOL COMMITTEE: RICHARD A. ZINSER, JOSEPH LYONS, ALBERT J. SMITH, CAROLYN FITZGERALD, PETER C. HAYES, MEMBERS OF THE CHARLESTOWN SCHOOL COMMITTEE: KENNETH O. BRIGHTMAN, RANDALL COLLINS, BLANCHE CYBULSKI, NANCY KENYON, LESLIE CHAMBERLAIN, ANDREW LAVIANO, THEODORE SELESIONA, WILLIAM FLYNN, THOMAS RAMBSEY, HARRIET WARD, AUGUSTA FINKELSTEIN, ALBERT B. LYONS, THE CHARIHO REGIONAL HIGH SCHOOL DISTRICT COMMITTEE,

PETITIONERS,

v.

DR. THOMAS C. SCHMIDT, AS COMMISSIONER OF EDUCATION OF THE STATE OF RHODE ISLAND, DR. WILLIAM P. ROBINSON, JR., AS ASSOCIATE COMMISSIONER OF EDUCATION, ANTHONY SOLOMON, AS GENERAL TREASURER OF THE STATE OF RHODE ISLAND, MEMBERS OF THE BOARD OF REGENTS: ALBERT E. CARLOTTI, ANDREW R. BONTE, DR. AUGUSTINE CAPOTOSTO, HENRY J. NARDONE, BERNARD V. BUONANNO, JOHN J. LYNCH, JOHN J. KANE, MARY P. LYONS, NORMA B. WILLIS, RICHARD ZORABEDIAN, DONNA MARIE PELUSO, REP. THOMAS A. LAMB, SEN. ROBERT J. MCKENNA, J. JOSEPH GARRAHY, AS GOVERNOR OF THE STATE OF RHODE ISLAND,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

AMATO A. DELUCA*
SANDRA A. BLANDING
REVENS & DELUCA LTD.
946 Centerville Road
Warwick, Rhode Island 02886
Attorneys for Petitioners

*Counsel of Record

Blanchard Press, Inc., Boston, Mass. — Law Printers (617) 426-6690

I

QUESTION PRESENTED

Whether Title 16, Chapter 21.1, of the Rhode Island General Laws, Entitled "Transportation of School Pupils Beyond City and Town Limits," Violates the Establishment Clause of The First Amendment to The United States Constitution, Made Applicable to The States Through the Fourteenth Amendment, Insofar as it Provides Substantially Greater Transportation Benefits to Non-Public School Students than to Public School Students, and the Large Majority of the Non-Public School Students Benefited Attend Religious Affiliated Schools.

TABLE OF CONTENTS

	Page
Question Presented	1
Opinions Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	13
Conclusion	19
Appendix	A-1

TABLE OF AUTHORITIES

Cases

Board of Education v. *Allen*, 392 U.S. 236 (1968) 14

Chaves v. *School Committee of the Town of Middletown*, 100 R.I. 140, 211 A.2d 639 (1965) 4

Committee For Public Education v. *Nyquist*, 413 U.S. 756 (1973) 14, 15

Everson v. *Board of Education*, 330 U.S. 1 (1957) 14

Jennings v. *Exeter—West Greenwich Regional School District Committee*, 116 R.I. 90, 100-101, 352 A.2d 634, 640 (R.I.) 5, 6

McKeesport Area School District v. *Pennsylvania Department of Education*, 39 Pa. Commw. 290, 392 A.2d 912 (1978) 13, 14, 16

Members of the Jamestown School Committee v. *Schmidt*, 427 F. Supp. 1338 (D.R.I., 1977) 6, 13, 16

Mueller v. *Allen*, 51 USLW 5050 (1983) 14, 15, 17

Pequea Valley School District v. *Pennsylvania Department of Education*, 483 Pa. 539, 397 A.2d 1154, Appeal, 443 U.S. 901 (1979) 13, 14, 16

Page

School District of Pittsburgh v. *Pennsylvania Department of Education*, 443 U.S. 901 (1979) 13, 14
Springfield School District v. *Pennsylvania Department of Education*, 483 Pa. 539, 397 A.2d 1154 .. 13, 14, 15, 16
Tilton v. *Richardson*, 403 U.S. 672 (1971) 15
Walz v. *Tax Commission*, 397 U.S. 664 (1970) 15
Wolman v. *Walter*, 433 U.S. 229, 253 (1977) 16

Constitutional Provisions

U.S. Constitution
Amendment I 2, 3
Amendment XIV 3

Statutes

R.I.G.L. § 16-2-2 4
§ 16-3-1 ..... 3, 10
§ 16-21-1 ..... 3, 4, 6, 17
§ 16-21-2 ..... 4, 6
§ 16-21.1 I
§ 16-21.1-1 ..... 2, 3, 6, 11, 13, 14, 17
§ 16-21.1-3 12
28 U.S.C. § 1254 2
R.I. Special Act of the Legislature, 1966, No. 714 10
Pa. Act 372 16

In the
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

MEMBERS OF THE JAMESTOWN SCHOOL COMMITTEE:
RICHARD A. ZINSER, JOSEPH LYONS, ALBERT J. SMITH,
CAROLYN FITZGERALD, PETER C. HAYES,
MEMBERS OF THE CHARLESTOWN SCHOOL COMMITTEE:
KENNETH O. BRIGHTMAN, RANDALL COLLINS,
BLANCHE CYBULSKI, NANCY KENYON, LESLIE CHAMBERLAIN,
ANDREW LAVIANO, THEODORE SELESIONA,
WILLIAM FLYNN, THOMAS RAMBSEY, HARRIET WARD,
AUGUSTA FINKELSTEIN, ALBERT B. LYONS,
THE CHARIHO REGIONAL HIGH SCHOOL DISTRICT
COMMITTEE,
PETITIONERS,

v.

DR. THOMAS C. SCHMIDT, AS COMMISSIONER OF EDUCATION OF THE STATE OF RHODE ISLAND, DR. WILLIAM P. ROBINSON, JR., AS ASSOCIATE COMMISSIONER OF EDUCATION, ANTHONY SOLOMON, AS GENERAL TREASURER OF THE STATE OF RHODE ISLAND, MEMBERS OF THE BOARD OF REGENTS: ALBERT E. CARLOTTI, ANDREW R. BONTE, DR. AUGUSTINE CAPOTOSTO, HENRY J. NARDONE, BERNARD V. BUONANNO, JOHN J. LYNCH, JOHN J. KANE, MARY P. LYONS, NORMA B. WILLIS, RICHARD ZORABEDIAN, DONNA MARIE PELUSO, REP. THOMAS A. LAMB, SEN. ROBERT J. MCKENNA, J. JOSEPH GARRAHY, AS GOVERNOR OF THE STATE OF RHODE ISLAND,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The opinion of the United States District Court for the District of Rhode Island in the instant case is cited at 525 F.Supp. 1045 (D.R.I., 1981) and is set forth in the Appendix herein, pages A-35 through A-50.

The opinion of the United States Court of Appeals for the First Circuit is cited at 699 F.2d 1 (1st Cir., 1983) and is set forth in the Appendix herein, pages A-1 through A-31.

The denial of Plaintiffs' Petition for a Rehearing is set forth in the Appendix herein, pages A-32 through A-34.

Jurisdiction

The Petitioners here seek review of the decision in this matter rendered by the United States Court of Appeals for the First Circuit on January 19, 1983, to the extent that said decision reverses the decision of the United States District Court and upholds the constitutionality of Rhode Island General Laws §16-21.1-1 et seq. The United States Court of Appeals for the First Circuit subsequently denied Plaintiffs' Petition for a Rehearing on March 10, 1983, and further denied Plaintiffs' Motion for a Stay of Mandate on March 28, 1983. Mandate accordingly issued on March 29, 1983.

Subsequently, the United States Supreme Court granted Petitioners' Request for an Extension of Time within which to file a Petition for Certiorari to July 30, 1983.

This Court's jurisdiction to review the judgment of the United States Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. §1254.

Constitutional Provisions Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This action challenges constitutionality of Rhode Island General Laws §16-21.1-1 et seq., cited at A-52 through A-55. Also relevant is Rhode Island General Laws §16-21-1 cited at A-51.

Statement of the Case

This petition comes before the Court as the product of more than a decade of attempts by the Rhode Island General Assembly to provide publicly supported transportation to non-public school students who attend schools beyond the limits of the school districts in which they reside.[1] The transportation which the legislature seeks to provide exceeds that provided to students who attend public schools.

[1] For the most part, in the State of Rhode Island each city or town comprises one school district. The only exceptions are regional school districts which are created pursuant to state law, R.I.G.L. §16-3-1 et seq. by the cooperative effort of two or more cities or towns.

In order to appreciate the signifcance of the issues presented to the United States District Court, it is necessary to review briefly the history of the challenged statute and its predecessors. Prior to 1971, Rhode Island General Laws provided as follows with regard to the transportation of elementary and high school students:

> [Section] 16-21-1. The School Committee of any town shall provide suitable transportation to and from school for pupils attending public schools of elementary and high school grades who reside so far from any public school as to make their regular attendance at school impracticable and for any pupil whose regular attendance would otherwise be impracticable on account of physical disability or infirmity.
>
> [Section] 16-21-2. The School Committee of any town shall provide pupils attending private schools of elementary and high school grades except such schools as are operated for profit, the same rights and privileges as to transportation, to and from school as are provided for pupils attending public school.

In 1965, the Supreme Court of the State of Rhode Island held that the intent of R.I.G.L. §16-21-2 was to require that school committees provide identical transportation benefits to public and non-public school students to schools located within the city or town in which the child resided. As the basis for its decision, the Court referred to R.I.G.L. §16-2-2, which mandates that each city or town establish and maintain schools for its children. *Chaves* v. *School Committee of the Town of Middletown*, 100 R.I. 140, 211 A.2d 639 (1965).

In response to the *Chaves decision*, the Rhode Island General Assembly rewrote *R.I.G.L.* §16-21-2 as follows:

> *Transportation of School Pupils without Town Limits.* In the event that any such public or private schools are

> consolidated, regionalized or otherwise established to serve residents in a specific area within the state, the School Committee of any town shall provide transportation for pupils attending such schools who reside within the town and within the area served by such schools notwithstanding the location of the school without the limits of the town if the pupil resides so far from the school that transportation to the school is provided within the town for other pupils who reside as far from school.

The Rhode Island Supreme Court subsequently held that the statute as revised unlawfully delegated legistative power to a private corporation, in violation of the State Constitution, Article IV Section 2.

> The Statute in question seems to us to have none of the safeguards which these courts have considered necessary to prevent arbitrary and selfish action by a private party. It invites private schools to act in their own self-interest by regionalizing or expanding their present territory and thereby passing their own transportation costs onto public school districts. This additional expense is potentially enormous inasmuch as there is no limit to the area which a private school could choose to "serve" . . . . [B]ecause of the opportunity of abuse inherent in this statutory scheme, we believe this statute constitutes an unreasonable delegation of legislative power.

Jennings v. *Exeter - West Greenwich Regional School District Committee*, 116 R.I. 90, 100-101, 352 A.2d 634, 640 (R.I.). The statute had come before the Court in *Jennings* as a result of the unilateral decision of a Roman Catholic regional school to expand its territory to include parishes in four additional towns. Because the Court reached a decision on the state constitutional claim, however, it declined to address the issue of whether the statute also violated the Establishment Clause to the First Amendment of the United States Constitution.

Immediately following the State Supreme Court's decision in *Jennings*, the Rhode Island General Assembly enacted an amendment to R.I.G.L. §16-21-2 which added the following language: ". . . provided that a town shall not be required to transport any pupil beyond an area having a 15-mile radius from the school building which such pupil attends." One year later, the amended statute was declared unconstitutional by the United States District Court for the District of Rhode Island in *Members of the Jamestown School Committee* v. *Schmidt*, 427 F.Supp. 1338 (D. R.I., 1977) [hereinafter, Jamestown I]. In so holding, the Court determined that the primary effect of the transportation statute was to advance religion. The Court noted that the private sectarian school students were provided, by the terms of the statute, with transportation options not available to public school students. *Id.* at 1347.

Prompted by the District Court's decision, the Rhode Island General Assembly enacted yet another statutory scheme entitled "Transportation of School Pupils Beyond City and Town Limits," R.I.G.L. §16-21.1-1 et seq. It is the constitutionality of this statute which is now before the Court.

The Plaintiffs who bring this action include three school committees who are required to provide transportation to students residing within their respective districts, and several individuals who are taxpayers in the local communities and who are, in some cases, individual members of the Plaintiff school committees. The parties agreed, initially, that approximately 85% of the children attending non-public schools in the State of Rhode Island attend sectarian schools operated by religious bodies which provide, in part, religious education.

Plaintiffs introduced extensive evidence with regard to the costs to several cities and towns to provide transportation to non-public school students residing outside the school district.[5]

[5] The transportation of public school students and of private school students within the school districts in which they reside is provided for in a separate statute, R.I.G.L. 16-21-1; A-51.

In Jamestown, for example, the least expensive method of transporting the 22 non-public school students who attend sectarian schools in Region IV is $18,630.00 per year, or $847.00 per student per year, compared to $180.00 per student per year to transport students to the Jamestown Elementary School. Similarly, the cost to the Chariho Regional School District of transporting the 26 resident students who attend two sectarian schools located in Region IV outside the Chariho Regional School District ranges from $16,277.00 to $25,522.00 annually, or $478.00 to $750.00 per pupil per year. If fewer students were transported to the same schools, the total annual cost would remain the same, and the per pupil cost would increase. In contrast, the total cost of transporting public school and special education students within the Chariho Regional School District is $355,093.00 annually, or $197.27 per pupil per year. The City of Warwick, located in Region II, expends $593,700.00 per year, or $84.00 per pupil per year, to transport public school students (excluding those in special education programs) as opposed to $122.00 per pupil per year to transport sectarian school students within Region II.[3]

The Superintendent of Schools of Johnston testified that the School Committee runs a separate mid-day bus, at a cost of $30.00 per day, for kindergarten children attending two Roman Catholic Schools located outside of the school district but within Region III, in which Johnston is located. Regular

[3] Prior to the decision of the United States Court of Appeals in the instant case, in which that Court held unconstitutional the provision of the challenged statute which requires school committees to transport non-public school students outside of the region to schools within a 15-mile radius, the City of Warwick was also transporting students to two sectarian schools located in the City of Providence at a cost to the City of $2,473.75 per student.

The figure of $122.00 per pupil refers only to the cost of transporting non-public school students to schools within Region II, whether the school is located within the City of Warwick or not. Plaintiffs here challenge only the transportation of non-public school students outside the City, a benefit not afforded to public school students.

school buses cost the School Committee $119.50 per bus per day, with a mileage limit of 80 miles per bus. For each mile traveled in excess of 80 miles, the School Committee is charged an additional $1.49. Thus, the increased distance traveled in transporting parochial school students outside the Town of Johnston's borders must necessarily result in increased cost to the School Committee above the costs incurred for the transportation of students within the town's or school district's borders. Similarly, the Coventry School Department, which transports 20 students to a parochial school located 15 miles away but within Region II, must reimburse the bus company at the rate of $.20 per mile for all miles driven over 80 miles per day per bus and for all fuel costs in excess of $.50 per gallon. Finally, the City of Newport expends approximately $180.00 per student per year to transport students to religiously affiliated regional schools located outside the City of Newport. In addition, the City must transport those students two days per year during which the public schools are not in session.

In contrast to deposition and trial testimony, cited above, the State of Rhode Island submitted, as evidence of the comparative costs of busing public school students, as compared to non-public school students attending schools outside the school district, the results of the survey submitted by each school department within the State.[4] Plaintiffs dispute the accuracy of this survey for several reasons: (1) the survey fails to ask how the costs which it requests have been computed. The separation of transportation costs according to location or type of school involved is a complex task, requiring an analysis of bus routes, base rates, fuel costs, and excess mileage. Testimony

[4] According to the results of the state's survey, the state-wide cost of transporting public school students within the school districts in which they reside is $100.00 per student per year, while the cost of transporting non-public school students to schools outside of the districts in which they reside is $108.00 per student per year.

elicited during depositions, particularly those relating to Warwick, Coventry, and Johnston, point out that detailed questioning is necessary to obtain an accurate analysis. (2) Over half of the school districts participating provided no data with regard to the cost of busing public school students outside the school district in which they reside. There is no way of determining, from the questionaire alone, why this information was excluded. For these reasons, Plaintiffs assert that the only valid information submitted with regard to the comparative costs of student transportation is that elicited by testimony and outlined above. Indeed, the United States District Court found:

> The Court, however, cannot accord these figures [derived from the State's survey] great weight because of problems associated with the survey. First, I note that data collected by the survey are incomplete inasmuch as 23 school districts, for reasons not explained in the record, failed to submit figures for non-public school children bused outside of the school district. Second, and of greater importance, the survey provides no information as to how the reported costs were calculated. It is therefore difficult to assess how accurate the survey is in determining the actual costs for the transportation of students.
>
> I note that the parties had the opportunity to explore in detail the costs of transportation for particular school districts through the taking of depositions. This testimony reveals that in some instances it is substantially more expensive to transport non-public school students outside of the school district than it is to provide transportation to public school students within the school district. . . .
>
> On balance, it is clear that it is more expensive to bus non-public school students to religious schools outside the

> school district than it is to bus public school students to local schools. How much more expensive it is, is uncertain, but it is also unimportant.

525 F. Supp. at 1050, A-43-44.

In addition to the disproportionate costs of busing non-public school students to regional schools located outside the district in which the student resides, the manner in which non-public schools may regionalize is also relevant. The Associate Commissioner of Education testified that Roman Catholic schools are regionalized merely by their own decision to expand and serve areas not originally served by local parish schools. Indeed, Monsignor Clarke Regional School, created by a special Act of the legislature, is empowered "to serve such regions within the State of Rhode Island as the Corporation may from time to time determine..." Special Act of the Legislature, 1966, No. 714. In comparison, a public school district cannot be regionalized except upon the recommendations of regional school district planning committees created in two or more towns, followed by affirmative vote of the townspeople in a special or annual financial town meeting. Once approved, a regional school district possesses no power to unilaterally expand its area. R.I.G.L. 16-3-1 et seq.

Finally, in times of ever-tightening municipal budgets, Plaintiffs introduced evidence that several cities and towns have implemented, or attempted to implement, reduced bus transportation for public school students, while being forced to maintain transportation for non-public school students attending sectarian schools located outside of the school district. The Town of Johnston, for example, during the school years 1978-1979 and 1979-1980, reduced the number of buses used by the school department for pupil transportation by means of more stringent enforcement of the requirement that students live a certain distance from their schools before they are provided transporation, and by requiring them to walk greater

distances to bus stops. The minimum distance requirements, however, do not apply to students attending St. Thomas School or the Cranston/Johnston Regional School, both of which are Roman Catholic regional schools located outside the Town of Johnston. Similarly, in 1979, the Warwick School Committee attempted to reduce the cost of transporting students by increasing the minimum distance which public school students must live from their schools before they would be eligible for transportation. Approximately 200 parents attended the public meeting held to discuss this issue; as a result of their concern and dissatisfaction with the proposal, no changes in the guidelines for transportation were initiated. Again, in 1980, the School Committee attempted to reduce expenditures for student transportation by increasing the distance public school students must walk before they are eligible for transportation and by altering daily school schedules. Again, parent reaction was so negative that the School Department reinstated its prior schedule and mileage limits. This controversy highlights the discrepancies between the benefits which the challenged statute provides, in operation, to religious school students, as compared to public school students. By virtue of R.I.G.L. § 16-21.1-1, transportation to non-public regional schools, which are predominantly religiously affiliated, is mandated by law, regardless of the disproportionate and excessive cost of such transportation, and regardless of whether public school students are provided equal transportation benefits.

The action taken by the City of Newport demonstrates most clearly the discrepancy between transportation benefits which must be provided to non-public school students, compared to public school students. During the preparation of the 1980-81 school budget, the Newport School Committee entertained a motion by one of its members to eliminate all busing for parochial or religious school students. As a result of this motion, the Chairman of the Newport County Regional Catholic School appeared before the School Committee with a large

group of Catholic school parents to voice their opposition to the proposed plan. That plan was subsequently defeated, and the present busing policy was implemented. That policy has eliminated all transportation for public school students attending grades seven through twelve. This policy has naturally generated opposition by the parents of public school students, several of whom have appeared before the School Committee in open session to express their objection to the policy and to urge the School Committee to consider reinstituting bus transportation for junior and high school students.

The United States District Court, in assessing the evidence presented to it, concluded that "it is apparent from all this that non-public school students enjoy transportation options under the challenged statute that are not available to public school students. The statute thus lacks the benevolent neutrality required of state action in this sensitive area, and has the constitutionally impermissible effect of advancing religion." 525 F. Supp. at 1050, A-42. In addition, the Court held that the statute has caused "significant administrative interaction between public school and sectarian school officials," as well as "the potential for political fragmentation along religious lines. . . [which] has to some extent already been realized." 525 F. Supp. at 1051-52, A-45, 47. The Court accordingly granted Plaintiffs declaratory and injunctive relief.

On appeal, the United States Court of Appeals for the First Circuit affirmed the judgment of the District Court insofar as it relates to the variance provision of the statute, R.I.G.L. 16-21.1-3, which requires a city or town to provide bus transportation to students attending a non-public school located outside the region in which the town is located, but within a 15-mile radius, if the Commissioner of Education determines that there "is no similar school within the region". As grounds for its decision, the Court observed that "there are no standards to guide the Commissioner's assessment of similarity, and that religion is a primary aspect of the cur-

ricula to be compared," in violation of the Establishment Clause prohibition against government entanglement with religion. *Jamestown* v. *Schmidt*, 699 F.2d 1, 13, A-20 (1st Cir. 1983). The Court of Appeals reversed, however, the remainder of the District Court's decision, relying exclusively upon this Court's dismissal of the appeals in *Springfield School District* v. *Pennsylvania Department of Education*, 483 Pa. 539, 397 A.2d 1154, *appeal dismissed for want of a substantial federal question sub. nom. School District of Pittsburgh* v. *Pennsylvania Department of Education*, 443 U.S. 901 (1979); *Pequea Valley School District* v. *Pennsylvania Department of Education*, 483 Pa. 539, 397 A.2d 1154, *appeal dismissed for want of a substantial federal question*, 443 U.S. 901 (1979); and *McKeesport Area School District* v. *Pennsylvania Department of Education*, 38 Pa. Commw. 290, 392 A.2d 912 (1978), *appeal dismissed for want of a substantial federal question*, 446 U.S. 970 (1980). 699 F.2d at 7-10 A-10-14.

Reasons for Granting the Writ

The issue in this case is whether a Rhode Island statute providing bus transportation to non-public school children beyond school district limits constitutes a violation of the Establishment Clause.

This petition urges that the decision of the Court of Appeals for the First Circuit involves an important question of constitutional law which has not been, but should be, resolved by this Court. The Court of Appeals' decision suggests that a statute which primarily benefits sectarian schools at public expense is not constitutionally infirm. More particularly, the Court of Appeals completely disregarded the plain language of Rhode Island General Laws § 16-21.1-1 *et seq.* when it found that the "District Court's insistence on strict equality is foreclosed by the Supreme Court's. . . decisions in *Springfield School District* v. *Pennsylvania Department of Education*,

483 Pa. 539, 397 A.2d 1154, *appeal dismissed for want of a substantial federal question sub nom. School District of Pittsburgh* v. *Pennsylvania Department of Education*, 443 U.S. 901 (1979); *Pequea Valley School District* v. *Pennsylvania Department of Education*, 483 Pa. 539, 397 A.2d 1154, *appeal dismissed for want of a substantial federal question*, 443 U.S. 901 (1979); and *McKeesport Area School District* v. *Pennsylvania Department of Education*, 38 Pa. Commw. 290, 392 A.2d 912 (1978), *appeal dismissed for want of a substantial federal question*, 446 U.S. 970 (1980)" and ". . . the fact that public students are ordinarily ineligible for busing to schools beyond the district lines does not render § 16-21.1-1 invalid under the Establishment Clause or the Equal Protection Clause." 699 F.2d at 7-8 A-10,12.

The Court of Appeals completely misconstrued and misapplied the facts and the law in its decision.

It is clear that the statutory scheme under consideration is constitutionally defective in that the transportation program violated the *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Mueller* v. *Allen*, 51 USLW 5050 (1983), requirements that benefits be provided to all school children equally. More particularly, § 16-21.1-1 *et seq.* affords benefits to non-public school children that are not available to public school students. Thus, the state aid involved here is flowing to a special class of children composed almost exclusively of students in sectarian elementary and secondary schools, which fulfill an integral part of the religious mission of the churches which support them.

The key is whether or not the statute and its resulting aid can fairly be viewed as the state taking a neutral posture toward a religious institution. *Id.* In *Committee For Public Education* v. *Nyquist*, 413 U.S. 756 (1973), this factor had considerable bearing and this Court explicitly distinguished the *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Everson*, finding that "[they] . . . differ from the present litiga-

tion in a second important respect. In both cases the class of beneficiaries included *all* school children, those in public as well as those in private schools." *Committee For Public Education* v. *Nyquist*, 413 U.S. at 782 Ftnt. 38. Similarly in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), federal aid was made available to all institutions of higher learning, and in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), tax exemptions were accorded to all educational and charitable nonprofit institutions.

In *Mueller* v. *Allen*, this Court upheld a Minnesota statute which allowed state taxpayers in computing their income tax to deduct expenses incurred in providing "tuition, textbooks, and transportation" for their children attending an elementary or secondary school even though the statute primarily benefited parents of sectarian school children. Finding that the deduction was available for educational expenses incurred by *all* parents, regardless of the school their children attended, this Court concluded that the Minnesota statute "neutrally" provided state aid to a broad spectrum of its citizens and therefore was not subject to challenge under the Establishment Clause. 51 USLW at 5053.

In *Springfield School District* v. *Pennsylvania Department of Education*, the Pennsylvania Supreme Court also relied upon the equality of benefits provided to public and nonpublic school students in holding that the challenged statute had a primary effect that neither advanced nor inhibited religion. The statute at issue before the Pennsylvania Supreme Court provided that:

> The Board of School Directors in any school district may . . . provide for the free transportation of any resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the boundaries or outside the district boundaries at a distance not exceeding 10 miles by the

> nearest public highway... When provision is made by a Board of School Directors for the transportation of public school pupils to and from such schools... the Board of School Directors shall also make *identical* provision for the free transportation of pupils who regularly attend non-public kindergarten, elementary school and high school not operated for profit to and from such schools... [hereinafter Act 372] (emphasis added).

397 A.2d at 1156-57.

As that Court noted, the Act on its face mandates equal treatment of public and non-public school pupils. "The statute requires non-public school students receive transportation opportunities 'identical' to those accorded public school students..." *Id.* at 1163. The Pennsylvania Court accordingly found that "On its face, then, because it confers its benefits equally upon students attending public and non-public schools, Act 372 does not violate the Establishment Clause by favoring a religious group." *Id.* at 1163.

Disregarding the Pennsylvania Supreme Court's reasoning, the Court of Appeals in the instant case found the difference in the Rhode Island and Pennsylvania statutes to be not of constitutional dimensions, stating that the fact that public school students are ordinarily ineligible for busing to schools beyond district lines did not render § 16-21.1-1 invalid. Relying on this Court's "common to all" approach, in *Wolman* v. *Walter*, 433 U.S. 229, 253 (1977) and the cases that followed, the Appeals Court attempted to "reconcile" the inequities upheld in *Springfield* and *Pequea* and *McKeesport* with these authorities by holding that the "common to all" language cannot be read to require "absolute equality of access or expenditure, either state-wide, taking the busing program as a whole, or district-by-district in each of the program's inter—and intra-district parts." *Jamestown* v. *Schmidt*, 699 F.2d at 9, A-14. The Court read this language to limit the degree of disparity by man-

dating that the busing of students within the district or across district lines must be available to students on the same terms and with the relative cost per-student of sectarian and public school student busing remaining "roughly proportional." *Id.* at 9, A-14.

Petitioners suggest that the Court of Appeals' reasoning is in complete contravention to the cases it relied upon, to *Mueller* v. *Allen*, and to the facts as contained in the District Court's decision.

As the District Court found, R.I.G.L. § 16-21.1-1 *et seq.* fails to fulfill the criterion of identical opportunities for public and non-public school pupils. On the contrary, § 16-21.1-1 specifically states that one of the purposes of that statute is "... to afford to pupils who attend public schools the opportunity *at the election of the School Committee* of the city or town in which the pupils reside, to attend a public school, either full-time or part-time, outside of the city or town which *provides a program or curriculum not available within the city or town in which the pupil resides*..." (emphasis added)

No comparable limitation is placed on non-public school students who desire transportation to schools outside the city or town in which they reside. Thus, the statute on its face provides disparate treatment of public and non-public school pupils, the effect of which, under the facts before the District Court, is to provide special advantages to pupils in non-public schools.

Indeed, it is clear that the Rhode Island law provides no benefit at all to public school students since they are transported in-district pursuant to R.I.G.L. § 16-21-1 and since all other public school students, such as those in special education or vocational programs, are on "a different footing from the general curriculum". 699 F.2d at 11, Ftnt. 9, A-16.

The statute thus lacks the beneficial neutrality required in this sensitive area and has the constitutionally impermissible effect of advancing religion.

The Court of Appeals also rejected the District Court's finding that it is more expensive to bus non-public school children to religious schools outside the district than it is to bus public school students to their local schools. Although the Court of Appeals adopted the District Court's findings that school budgets have been "pared to the limit," 699 F.2d at 5, A-6 it rejected the lower court's findings that "At the same time, local school committees are being required to fund expensive transportation options for children who have chosen to attend a regionalized sectarian school." 525 F. Supp. at 1051, A-44. The Appellate Court remarked that the District Court had made only a general finding of disparity and that the record contained insufficient evidence on cost to warrant a finding that the statute is invalid.

Petitioners submit that the cost of transportation for students attending sectarian schools is, in fact, so disproportionate compared to the ordinary expense of public school transportation that the benefit accruing to sectarian institutions and sectarian school pupils has, in effect, provided substantial benefit and advancement to religious institutions. As the District Court found, approximately eighty-five (85%) per cent of the children attending non-public schools in Rhode Island are enrolled in sectarian schools which provide, in part, religious education. 525 F. Supp. at 1050, Ftnt. 4, A-42. Testimony and evidence submitted to the District Court unequivocally demonstrate that the cost to school districts of transporting students to non-public schools outside their borders is substantially higher than the cost of transporting students within the district. Furthermore, the financial burden of providing such services has necessitated or would necessitate a cutback in educational services or transportation provided to public school students.

Conclusion

For the reasons set forth in this petition a Writ of Certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

AMATO A. DELUCA
SANDRA A. BLANDING
REVENS & DELUCA, LTD.
946 Centerville Road
Warwick, Rhode Island 02886
Attorneys for Petitioners

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 82-1081

MEMBERS OF THE JAMESTOWN SCHOOL COMMITTEE, ET AL.,

PLAINTIFFS, APPELLEES,

v.

DR. THOMAS C. SCHMIDT, AS COMMISSIONER OF EDUCATION OF THE STATE OF RHODE ISLAND, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
ROSENN* and BREYER, *Circuit Judges*.

Daniel J. Schatz, Special Assistant Attorney General, with whom *Dennis J. Roberts, II*, Attorney General, was on brief, for appellants.

Amato A. DeLuca, with whom *Sandra A. Blanding*, and *Revens & DeLuca, Ltd.* were on brief, for appellees.

January 19, 1983

COFFIN, *Chief Judge*. The issue in this case is whether a Rhode Island statute providing bus transportation to non-public school children beyond school district limits constitutes a "law respecting an establishment of religion" and is therefore invalid under the First and Fourteenth Amendments. Plain-

* Of the Third Circuit, sitting by designation.

tiffs are several federal, state and local taxpayers and two organizations, the American Civil Liberties Union and Americans United for Separation of Church and State.[1] The district court, finding that the law provides sectarian school children with "greater options at greater public expense than their public school counterparts", and that administrative contacts to coordinate the program together with the risk of political division along religious lines created "an excessive entanglement of church and state", held the law unconstitutional. *Members of the Jamestown School Comm.* v. *Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981) (*Jamestown III*).

I. *Litigation History*

The State of Rhode Island has struggled persistently but thus far unsuccessfully to extend the benefits of its school busing program to nonpublic students who attend nonprofit schools outside of their local school districts. As originally enacted, the busing statute stated that "[t]he school committee of any town shall provide suitable transportation to and from school for pupils attending public schools . . . who reside so far from any public school as to make their regular attendance at school impracticable . . . ." R.I. Gen. Laws § 16-21-1 (former version). A second provision required such school committee to "provide for pupils attending private schools . . . the same rights and privileges as to transportation to and from schools as are provided for pupils attending public schools." § 16-21-2 (repealed).

The Rhode Island Supreme Court subsequently interpreted the statutory phrase "public schools" to apply only to public schools within a student's local school district; therefore, the

---

[1] Plaintiffs have standing as taxpayers to challenge a legislative enactment authorizing the expenditure of funds as violative of the Establishment Clause under the principles of *Flast* v. *Cohen*, 392 U.S. 82 (1968). *See, e.g., DiCenso* v. *Robinson*, 316 F. Supp. 112, 114 n.1 (D.R.I. 1970) (three-judge court), *aff'd sub nom. Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The Court recently reaffirmed the legitimacy of taxpayer standing under *Flast*. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 50 U.S.L.W. 4103, 4107-08 (Jan. 12, 1982).

court ruled that the provision requiring that private students be offered "the same rights and privileges" as public students did not authorize busing private students *beyond* local districts. *Chaves* v. *School Comm. of the Town of Middletown*, 100 R.I. 140, 211 A.2d 639 (1965). The statute was thereafter amended to require that public transportation be provided to students residing within an area served by any "public or private schools [which] are consolidated, regionalized, or otherwise established to serve residents of a specific area within the state. . . notwithstanding the location of the school without the limits of the town." Although this law authorized inter-district busing, it provided no standards to limit or guide the discretion of private schools in expanding the size of the areas they would serve. The state Supreme Court therefore held that it constituted an impermissible delegation of legislative power to a private entity, and invalidated the law with respect to "regions" not in existence when the statute was enacted. *Jennings* v. *Exeter-West Greenwich Regional School Dist. Comm.*, 116 R.I. 90, 352 A.2d 634, 638-40 (1976).

In response to this ruling, the state legislature imposed the additional limitation that "a town shall not be required to transport any pupil beyond an area having a (fifteen) 15 mile radius from the school building which such pupil attends." The federal district court, however, held that this amended law violated the Establishment Clause. *Members of the Jamestown School Comm.* v. *Schmidt*, 427 F. Supp. 1338 (D.R.I. 1977) (*Jamestown II*). The court found, first, that the law "does not in practice, as it purports to, provide transportation benefits to public and sectarian school children alike." *Id.* at 1343. Because transportation must be provided for most public school children (aside from vocational and special education students) "only within the local school districts", the court concluded that the primary beneficiaries of the law were children "attending private schools, the vast majority of which are sectarian." *Id.* Therefore, the law as applied provided "an

additional option to children attending out-of-district non-public (i.e., sectarian) schools". *Id.* at 1347. The court also found that the statute would impermissibly entangle church and state in two ways, by increasing the amount of administrative coordination necessary to plan transportation routes, and by exacerbating political fragmentation along religious lines. *Id.* at 1349. There was no appeal from this decision.

Finally, in 1977, the state legislature enacted the busing provisions challenged here, R.I. Gen. Laws §§ 16-21.1-1, -2, & -3. The statute divides the state into five regions, and requires each local school committee to provide a resident student, whether attending a public or private school, with "bus transportation to the school or facility which the pupil attends", as long as the school is "within the region in which the pupil resides." § 16-21.1-2. The law also has a variance procedure which allows a public or private student to attend a school outside of the *region* in which the student resides if the Commissioner of Education "finds that there is no similar school within the region, that such transportation is necessary to provide an educational opportunity which the pupil has a right to pursue, and that the school building which the pupil attends is within fifteen (15) miles of the city or town of which the pupil is a resident." § 16-21.1-3. While these provisions appear neutral, a public student may "*attend* a public school . . . outside of [his] city or town" *only* if the local school committee finds that such school "provides a program or curriculum not available within" the local school district, as authorized by R.I. Gen. Laws § 16-3.1-1 ("Cooperative Service Among School Districts"). § 16-21.1-1 (emphasis added). No similar requirement is imposed on private students. The same criteria or remoteness, however, apply to public and private students alike in determining their eligibility for busing in the first place—that is, all students, public and sectarian, are eligible for busing only if they "live at such distances from

the schools which they attend as to make it impractical or hazardous to require [them] to walk to school." § 16-21.1-1.

Plaintiffs in August 1977 initiated the present lawsuit in federal district court. Before deciding the federal constitutional issues raised, the district court certified several issues of state law to the Rhode Island Supreme Court. That court upheld the statute against the state constitutional challenges, ruling that the use of public funds to transport private school students was a proper means of "secur[ing] to the people the advantages and opportunities of education", R.I. Const. Art. XII, § 1, and that, unlike the law invalidated in *Jennings*, the present law was not an unconstitutional delegation of legislative power because it established "five school districts [i.e., regions] and a variance procedure [which] has carefully circumscribed the interest that private schools may have in expanding for purposes of transportation." *Members of the Jamestown School Comm.* v. *Schmidt*, R.I. 405 A.2d 16, 23-24 (1979) (*Jamestown II*).

Reaching the merits of the federal constitutional question, the district court in *Jamestown III* found the law "essentially indistinguishable" from the statute invalidated in *Jamestown I* and therefore held that it violated the Establishment Clause. 525 F. Supp. at 1048-49. Specifically, the court concluded that the statute unconstitutionally gave sectarian school children "greater options at greater public expense than their public school counterparts", *id.* at 1049, and that it had the impermissible effect of transferring a major cost of sectarian school regionalization to the taxpayers of the state. *Id.* at 1051. The court also found that the statute fostered excessive government entanglement with religion. First, it entailed "significant administrative interaction between public school and sectarian school officials" in connection with the busing program. *Id.* Second, it required the state Commissioner of Education to determine whether a sectarian school was "regionalized" and whether a sectarian school located outside a transportation

region was "similar" to a sectarian school within the region. *Id.* Finally, the court noted that public school budgets have been "pared to the limit", *id.*, and that the statute carried the potential, already realized in part, for political fragmentation along religious lines. *Id.* at 1052. The court stayed its decision pending appeal, however, finding that "a refusal to grant a stay will cause serious, irreparable harm to a large number of nonpublic school children" and that its decision on the merits was "not free from doubt."

With regard to the variance provision for busing beyond the five transportation regions, we agree with district court's entanglement analysis and affirm. As to the rest of its holding we reverse.

II. *The Relevant Authorities*

In analyzing the validity of the statute under the Establishment Clause, the district court applied the familiar three-part test. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and third, the law must not foster an excessive government entanglement with religion or excessive political divisiveness along religious lines. *Jamestown III*, *supra*, 525 F. Supp. at 1049; *see, e.g.*, *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

On the first prong of the three-part test, appellees strenuously argue that the lengthy and intricate history of antecedent legislative efforts to provide busing to sectarian students shows an impoermissible purpose in the present law's enactment to "supply financial support to non-public sectarian schools". The district court, however, found "no support in the record for such an assertion". *Jamestown III*, *supra*, 525 F. Supp. at 1049. Given the deference accorded to such a finding of the district court, we cannot say that it is unsupported, and,

given the Supreme Court's evident willingness to accept a stated secular purpose in school aid cases at esstentially face value,[2] we find no basis on which to disturb the district court's finding. Section 16-21.1-1 recites a number of purposes, among them "to protect the health, safety and welfare of pupils who live at such distances from the schools which they attend as to make it impractical or hazardous to require the pupil to walk to school." Under the leading Supreme Court case in this area, this is a constitutional secular purpose. *Everson* v. *Board of Education*, 330 U.S. 1, 7 (1947).

On the second prong of the three-part test, the district court held that inter-district transportation options must be equally available to all to pass constitutional muster. If unequal inter-

---

[2] *See, e.g., Wolman* v. *Walter*, 433 U.S. 229, 236 (1977) (though loan of instructional materials and equipment was invalid under the effect prong of the three-part test, Court had "no difficulty" in finding a "legitimate interest in protecting the health of [the states] youth and in providing a fertile educational environment") (one-paragraph discussion); *Meek* v. *Pettinger*, 421 U.S. 349, 363 (1975) (though direct loan of instructional materials to secular schools was unconstitutional under the effect test, Court "accept[ed]" without further analysis the secular legitimacy of the act's stated purpose of assuring school children "ample opportunities to develop their intellectual capacities"), (one-paragraph discussion); *Committees for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973) (though tuition grants, tuition tax credits and direct grants to secular schools for maintenance and repairs were invalid under the effect test, Court found it necessary to "touch only briefly on the requirement of a 'secular legislative purpose' ", since "the recitation of legislative purposes appended to New York's law" included "legitimate nonsectarian state interests" in preserving a healthy and safe educational environment for school children and promoting pluralism and diversity among public and nonpublic schools) (one-paragraph discussion); *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 613 (though Rhode Island teacher salary supplements and Pennsylvania salary, textbook and instructional material grants were invalid under the entanglement prong, "the statutes . . . clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws" and "[t]here is no reason to believe the legislatures meant anything else") (one-paragraph discussion). On the Court's treatment of the secular purpose test generally, *see* L. Tribe, *American Constitutional Law* 836-37, nn. 7 & 10, and authorities cited thereat.

district busing were a matter of first impression, we might well agree. First, a requirement of equal availability effectively ensures that a religious majority will not grant itself special benefits at general expense in the guise of general programs, and, by removing the temptaion for illicit legislative attempts, minimizes the prospects of recurrent political strife along religious lines that such attempts are likely to breed.

Second, although school district lines have no magic Establishment Clause significance in themselves,[3] they are not wholly irrelevant either. As the Supreme Court has recognized in another context, district lines reflect a strongly felt need in our society for local control of decisions vitally affecting the education of our children, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 49-51 (1973), and the local district remains the unit by which school transportation in Rhode Island is financed. At a time when school budgets have been pared to the limit, *Jamestown III*, *supra* 525 F. Supp. at 1051, taxpayers of a town at one end of a transportation region might predictably feel less than fairly treated if they must pay to transport sectarian students across town lines to the opposite end of the region just because those students prefer the distant school. Such resentment is especially likely if public school programs must be cut to cover the cost of that busing. If nothing else, inter-district busing thus presents a greater threat of political divisiveness along religious lines than intra-district busing.

Finally, the district court's approach provides a clear and workable test in an area where the lines of separation between church and state are, perhaps inevitably, blurred and indistinct. *See Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614.

---

[3] In this we agree with Judge Newman's conclusion in *Cromwell Property Owners Ass'n* v. *Toffolon*, 495 F. Supp. 915, 921 (D. Conn. 1979), that "[d]istrict lines are not, in and of themselves, constitutionally significant". We disagree, however, with his apparent conclusion that they have no Establishment Clause importance at all.

Such a requirement also avoids entangling the courts more deeply in difficult and politically sensitive determinations of the permissible degree of inequality — determinations for which we lack clear Supreme Court guidance, and which courts as institutions seem ill suited to make. Unlike the approach in employment discrimination cases, we should not like to contemplate undertaking to determine whether a given inter-district busing plan was pretextual or not. Nor does it seem to us realistic to inquire whether free transportation is a sine qua non or but-for cause of a sectarian school's survival.

While the Supreme Court upheld the basic constitutionality of state busing of sectarian students some 35 years ago in *Everson* v. *Board of Education*, *supra*, *Everson* alone would prove no barrier to the district court's approach. Though it is evident from the opinions and record that *Everson* involved some inter- as well as intra-district busing, and that parochial students, at least on the elementary level had greater inter-district options than public school students, we could reasonably view this discrepancy as de minimis. Because the respondent school board in *Everson* maintained no schools beyond the eighth grade, the board reimbursed all high school students, public and private, for the cost of public transit to the nearby cities of Trenton and Pennington. The board also paid the fares of five parochial elementary student in the district. *See Everson* v. *Board of Education*, *supra* 330 U.S. at 30 & n.7 (Rutledge, J., dissenting); *Everson* v. *Board of Education*, 133 N.J.L. 350, 351, 44 A.2d 333, 335 (1945). Those five acconted for less than two percent of the reimbursements to parents in one semiannual payment. In that same period, 21 parochial students were bused in all, and they accounted for less than five percent of the reimbursements as a whole — $357.74 of $8,034.95. *See Everson* v. *Board of Education*, 133 N.J.L. at 22-23, 44 A.2d at 335.

We do not, however, write on a blank slate. *Everson* does not stand alone. We are constrained by our discipline, which in this case compels us to accord critical weight to several summary decisions of the Supreme Court. More specifically, we are persuaded that the district court's insistence on strict equality is foreclosed by the Supreme Court's recent decisions in *Springfield School District* v. *Pennsylvania Department of Education*, 483 Pa. 539, 397 A.2d 1154, *appeal dismissed for want of a substantial federal question sub nom. School District of Pittsburgh* v. *Pennsylvania Department of Education*, 443 U.S. 901 (1979); *Pequea Valley School District* v. *Pennsylvania Department of Education*, 483 Pa. 539, 397 A.2d 1154, *appeal dismissed for want of a substantial federal question*, 443 U.S. 901 (1979); and *McKeesport Area School District* v. *Pennsylvania Department of Education*, 38 Pa. Commw. 290, 392 A.2d 912 (1978), *appeal dismissed for want of a substantial federal question*, 446 U.S. 970 (1980).

At issue in *Springfield*, *Pequea*, and *McKeesport* was a Pennsylvania statute providing for transportation of pupils to schools up to 10 miles beyond district lines. Since public school pupils in Pennsylvania, as in Rhode Island, must ordinarily attend schools in their home districts, the principal beneficiaries of inter-district busing were sectarian students. As here, the districts in *McKeesport* and *Springfield* argued that the scheme unconstitutionally gave sectarian students a special benefit unavailable to public students generally, in violation of the Establishment Clause:

> "A statutory requirement to provide [inter-district] transportation [to parochial students] where no similar transportation is provided to regular public school pupils raises a substantial Establishment Clause question.
>
> . . . .
>
> . . . . If the Act is permitted to stand, pupils attending nonprofit sectarian schools in Pennsylvania will

> receive greater benefits in the form of free transportation services than their public school counterparts." *McKeesport* Jurisdictional Statement 9, 12; *Springfield* Jurisdictional Statement 9, 13.

In *Pequea*, a companion case to *Springfield*, the district asserted that "[t]he precise issues addressed by the federal district court [ ] in *Schmidt [Jamestown I]* are present in the instant appeal", and argued that the inequalities in the act rendered it invalid on equal protection grounds:

> "[The Act] does not afford equal benefits to public and nonpublic pupils alike. Without applying for and receiving special dispensation, a public school student living in one school district can not, under the Pennsylvania School Code, attend a public school located in another district. Consquently, the transportation of public school pupils by their respective districts is confined to bussing [sic] said pupils to schools located within the district boundaries. The option of being transported outside the district is not, from a practical standpoint, available to public school pupils even though [the Act] does not by its terms prohibit such action. Other rules and regulations restricting attendance of public school pupils to schools located within the district serve to prevent the extra-district bussing [sic] of said pupils. Nonpublic school pupils, on the other hand, have the option of being transported outside district lines up to a distance of ten (10) miles . . . ." *Pequea* Jurisdictional Statement 12.

In each case, the Court dismissed the appeals for want of a substantial federal question.

While the precise meaning of summary decisions such as *Springfield*, *Pequea*, and *McKeesport* is necessarily uncertain, *see* R. Stern & E. Gressman, *Supreme Court Practice* 330-36 (1978) *and authorities cited therein*,[4] they remain decisions on

[4] The Supreme Court itself has conceded that its summary dispositions are often "somewhat opaque". *Gibson* v. *Berryhill*, 411 U.S. 564, 576 (1973).

the merits, binding on the lower courts at least as to the "specific challenges presented in the statement of jurisdiction". *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam). Whatever our personal views of the wisdom of the district court's approach, we are constrained to conclude that its requirement of strict equality of eligibility for inter-district busing — and with it, appellees' contentions on this issue — must fail. Although the Rhode Island and Pennsylvania statutes differ in certain particulars — Pennsylvania, for instance, restricts inter-district busing by means of a mile limit to schools ten miles beyond district lines, whereas Rhode Island relies in the first instance on geographical "transportation regions" to fix the outer limit of such busing — the differences are simply not of constitutional dimension.[5] So long as Public and sectarian children are bused to *their own schools*, and the same standard of remoteness applies to public and sectarian students alike, the fact that public students are ordinarily ineligible for busing to schools beyond district lines does not render § 16-21.1-1 invalid under the Establishment Clause or the Equal Protection Clause.[6]

Nor is it constitutionally significant, in itself, that Rhode Island sectarian students are bused over special routes rather than established public school routes. If sectarian students can constitutionally be bused to schools beyond public school district lines, they must necessarily be bused on other than established public school routes. Although the *Everson* Court

---

[5] Given the size of the school districts involved, the distances implicated by Rhode Island's transportation regions are comparable to those implicated in the Pennsylvania cases. *See, e.g., McKeesport* Jurisdictional Statement app. D at 7a (district measuring 18.7 miles by 14.8 miles; inter-district busing of more than 55 miles round-trip possible).

[6] We do not fault the district court for overlooking the Supreme Court's summary decisions in *Springfield*, *Pequea*, and *McKeesport*. Neither party mentioned *McKeesport* below or on appeal, and while both parties discussed the Pennsylvania Supreme Court's opinion in *Springfield* and *Pequea*, neither party mentioned the U.S. Supreme Court jurisdictional statements in those cases and their controlling precedential significance.

said it went to the "verge" in upholding a statute that provided for busing over established routes, later case have refused to limit busing schemes to such routes. *See McKeesport, supra; Spingfield, supra; Pequea, supra; Snyder* v. *Town of Newton*, 147 Conn. 374, 377-79, 161 A.2d 770, 772-73, *appeal dismissed for want of a substantial federal question*, 365 U.S. 299 (1961).

At the same time, our approval of § 16-21.1-1, -2 and -3 is limited. As the Supreme Court itself has cautioned, summary decisions such as *Springfield*, *Pequea*, and *McKeesport* "should not be understood as breaking new ground" or as overruling past precedents, "but as applying principles established by prior decisions". *Mandel* v. *Bradley*, *supra*, 432 U.S. at 176. In those prior decisions, the Court has referred uniformly to the constitutionality of transporting sectarian students as part of a "general" program "neutrally" provided "in common" to "all" school children. *Wolman* v. *Walter*, 433 U.S. 229, 253 (1977) (Establishment Clause not offered where a "municipal common carrier is ordered to carry *all* school children at a reduced rate, or where the police force is ordered to protect *all* children on their way to and from school") (emphasis added); *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746-47 (1976) (opinion of Blackmun, J., joined by Berger, C.J., and Powell, J.) (religious institutions "need not be quarantined from public benefits that are *neutrally* available to *all*") (emphasis added); *Meek* v. *Pittenger*, 421 U.S. 349, 364 (1975) (State may, "as part of *general* legislation made available to *all* students, . . . include church-related schools in programs providing bus transportation") (emphasis added); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 781-82 & n.38 (1973) (busing in *Everson*, whose "class of beneficiaries included *all* school children", public as well as private, was analogous to services such as police and fire protection, which was provided "*in common* to *all* citizens") (emphasis added); *Lemon* v. *Kurtzman*, *supra*,

403 U.S. at 616-17 (Establishment Clause permits bus transportation "supplied *in common* to *all* students") (emphasis added); *Everson* v. *Baord of Education*, *supra*, 330 U.S. at 17 (state may constitutionally "spend[ ] tax-raised funds to pay the bus fares of parochial school pupils as part of a *general* program under which it pays for fares of pupils attending public and other schools") (emphasis added).

While the Court's "common to all" language is at first blush difficult to square with the inequalities upheld in *Sprinfield*, *Pequea*, and *McKeesport*, we must reconcile the authorities as best we can. We do not read the "common to all" language to require absolute equality of access or expenditure, either statewide, taking the busing program as a whole or district-by-district in each of the program's inter- and intra-district parts. We do, however, read this language to limit the degree of disparity the Constitution will permit. Whether busing is within a district or across district lines, public and parochial students must be eligible for busing to *their* schools on the same terms: if distance is the criterion and sectarian students living a certain distance from their school are eligible for busing at public expense, public students living the same distance from their school must likewise be eligible.

Just as important, the relative cost per-student of sectarian and public student busing must remain roughly proportional. We agree with Judge Newman's observation in *Cromwell Property Owners Ass'n* v. *Toffolon*, *supra*, 495 F. Supp. at 923, that "[a]t some point, the cost of inter-district tramsportation for students attending sectarian schools may be so grossly disproportionate compared to the ordinary expense of public school busing that the 'indirect' benefits in regionalization accruing to sectarian institutions will rise to a constitutionally significant level" and have their primary effect the advancement of religion. We agree also with the Pennsylvania Supreme Court that constitutional limits are exceeded "if the cost of transportation for the students attending sectarian

schools [is] so disproportionate that it bec[o)me[s] apparent that the transportation provided to the public school youngster [is] merely a ruse to confer a benefit to the sectarian school pupil." *Sprinfield School District* v. *Pennsylvania Department of Education, supra*, 483 Pa. at 558 n.9, 397 A.2d at 1164 n.9. To these obsevations we add that inordinately long-distance busing calls into question the secular health, safety and welfare purposes cited in busing's support, for at some point, the increased hazards of travel over increasing distances and for increasing times may outweigh the benefits of the bus. Expenditures may also become so grossly disproportionate as to breed political divisiveness along religious lines.

Short of these limits, we intimate no views. Nor do we suggest a fixed proportion or a dollar or mile limit.[7] The balance is as much qualitative as quantitative, and will depend on the facts and circumstances of the case. But where a forbidden purpose or an impermissible primary effect is indicated, or where palpable disparity has bred signifcant divisiveness along religious lines, we are persuaded that a busing program will have ceased to be a "general" program of secular benefits neutrally available to all, and will have crossed the line from providing a "remote and incidental" benefit to offering a "direct and immediate" benefit to religion.[8]

---

[7] We have been urged, in the event that we could not uphold the entire statutory scheme, to validate the challenged program but require that per pupil transportation expenditures not exceed those for public students. Although an appropriations ceiling of this sort and the sort contained in the statute upheld in *Cromwell Property Owners Ass'n* v. *Toffolon, supra*, may be wise, such a ceiling is not required by the Constitution, and the enactment of one is a matter for the state legislatures and not the federal courts. As the Supreme Court wrote in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 761 & n.5 (1973), "it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, That no 'bright line' guidance is afforded." *See also Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) ("The problem, like many problems in constitutional law, is one of degree.").

[8] Nothing in our opinion today should be read to permit a "heckler's veto" over busing programs. As we observed recently in *Donnelly* v. *Lynch*,

Applying these principles to the instant case, we cannot say, at least on the present record, that Rhode Island has yet crossed that line. The district court found that inter-district busing of sectarian students was more expensive than intra-district busing of regular public students, and that the statute had "the effect *in fact* of transferring a major cost of regionalization" from sectarian schools and sectarian students' parents to the taxpayers of Rhode Island. *Jamestown III*, *supra*, 525 F. Supp. at 1051. Because the evidence on cost was incomplete, however, and the method of calculation unexplained, the district court made no finding as to the precise difference in cost between public and sectarian student busing. Since the Supreme Court's decisions permit some inequality, the district court's general finding of disparity is insufficient for us to hold the statute invalid on the present record on grounds of cost. We also question the propriety of comparing intra-district busing of public students with inter-district busing of sectarian students: if sectarian students may constitutionally be bused at public expense to their schools, wherever located, the relevant comparison would seem to be between the relative costs per student of public and sectarian busing *as a whole*.[9]

No. 81-1856, Slip Op. at 18 (Nov. 3, 1982), no program has ever been held invalid on political divisiveness grounds *alone*. To render cost differences constitutionally significant, there must not only be divisiveness; the objective disparity must also be palpable.

[9] We do not include here the cost of inter-district public busing of vocational students and special education students, but only public students in the regular curriculum. To this day, special education students are bused under a wholly separate statute from the one under consideration here, R.I. Gen. Laws § 16-24-4, as originally were vocational students. *See Jamestown I*, *supra*, 427 F. Supp. at 1343. In addition, the old vocational education provision established not five but nine schools and, in effect, nine transportation regions for vocational students. While vocational students at those nine schools are now bused under the same statute as sectarian students, it is clear from its origin that vocational education stands on a different footing from the general curriculum, and is not an appropriate element in the relevant comparison of costs.

Without precise figures on the relevant costs, the effect of the statute on the regionalization of sectarian schools is conjectural. There was no evidence that any church school was built or regionalized to take advantage of the law, or that transportation region lines were gerrymandered to give a hidden subsidy to existing church schools. Moreover, the current law does not permit church schools to expand indefinitely the area from which they will accept students. A sectarian school may if it wishes enroll students from all five transportation regions, but under current law, it cannot, absent special circumstances, require the public to pay for the transportation of students from outside the one region in which it is located — a region fixed by law and which the school is powerless to expand.

Should evils of the sort outlined above materialize, appellees are, of course, free to return to the district court to seek additional relief. We hold here only that on the present record, and under the controlling Supreme Court authorities, the district court's conclusion that the Rhode Island law has the primary effect of advancing religion must fail.[10]

We note also that the figures before the district court showed disparities in some districts far greater than the statewide averages. *See Jamestown III, supra*, 525 F. Supp. at 1050 ($84.27 per student per year to bus public school students within Warwick, versus $121.83 for inter-district busing of Warwick students to one sectarian school and $1,436.28 per student per year to another sectarian school). Whether or not such disparities may render the law invalid as applied in one district but not others is a question we do not reach here.

[10] The district court also found evidence of divisiveness along religious lines, but this divisivness, even if properly denominated "political", was unrelated to any differences in the cost of busing. We are persuaded also that the small difference in cost relied on by the district court ($108 per student per year statewide for inter-district busing of sectarian students versus $100 for intra-district busing of public students) would not justify our drawing an inference of impermissible legislative purpose, particularly when the cost difference between public and sectarian busing as a whole is likely to be even smaller.

III. *The Entanglement Problem of § 16-21.1-3*

The district court also found that the statute created an excessive entanglement of church and state in several ways. First, the court noted that the statute necessitated a substantial increase in the number of administrative contacts between public and sectarian school officials in order to coordinate the details of the transportation program. *Jamestown III*, 525 F. Supp. at 1051. Second, the court emphasized the unacceptable risk of "political fragmentation and division along religious lines", *id.*, *quoting Meek* v. *Pittenger*, 421 U.S. at 372, caused by public opposition to inter-district busing for private students. Finally, the court held that the statute on its face created excessive entanglement, by requiring the Commissioner of Education to determine whether a particular sectarian school is "regionalized", and to determine whether it is "similar" to another school for the purpose of granting a transportation variance. *Id.*

The record does not persuade us that the increase in administrative contacts is as yet a problem of constitutional magnitude. The district court found that the statute entailed "significant interaction between public school and sectarian school officials in order to provide for proper scheduling and routing of buses, necessary adjustment for holidays and special events, and so forth", and "to deal with discipline problems". *Id.* at 1049. We are not persuaded, however, that these contacts, standing alone, invalidate the program. Unlike teacher salaries or direct grants, which can be diverted to direct sectarian purposes, busing is by nature a "secular, neutral, [and] non-ideological service [ ]". *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616-17. Consequently, it involves neither forbidden state intrusion into religious matters, nor "comprehensive, discriminating, and continuing state surveillance" to ensure its confinement to secular use. *Id.* at 619. Rather, the contacts are ministerial or mechanical in nature, and concern

administrative, not religious, matters. Comparable contacts are intrinsic to virtually all busing programs, and appellees have not shown that the contacts at issue here are different in kind or degree from the contacts implicitly upheld by the Supreme Court in busing cases from *Everson* to *Springfield*, and explicitly approved in *Wolman* v. *Walter*, *supra*. *See generally Springfield School District* v. *Pennsylvania Department of Education*, *supra*, 483 Pa. at 563-66, 397 A.2d at 1166-68 for a good discussion of this issue. Nor, without more, do we believe that the Commissioner's determination of whether a school is "regionalized" entails excessive and impermissible entanglement of government and religion. That determination would seem to be a simple factual question, not requiring any assessment or comparison of religious curricula.

Likewise, the record does not persuade us that the risk of political division is as yet a problem of constitutional magnitude. The record for the most part shows only specific complaints over the mechanics of busing's administration. In one instance, Catholic parents objected to having their elementary school children bused with older high school students, who were from the public school. Complaints like this, however, are not properly "political" and were only incidentally along religious lines. They do not signal the sort of divisiveness with which the cases are concerned, for the Establishment Clause is not concerned with divisiveness generally, but only *political* divisiveness *along religious lines*. In the instance cited above, the parents complained as parents, not as Catholics, and their complaint concerned the public students' age, not their religion.

We are more troubled by the appearence of a large number of Catholic parents and parochial school officials at a school committee meeting in Newport to object to a proposal to eliminate busing altogether. Controversies of this sort more properly pose a risk of constitutionally significant division along religious lines, for in such a case, parochial school parents have a special political interest *as parochial school*

parents — i.e, as Catholics — wholly apart from their status as taxpayers or parents generally. Because it was isolated, we cannot say that this single incident renders the Rhode Island law invalid. *See Donnelly* v. *Lynch*, No. 81-1856, Slip Op. at 18 (1st Cir. Nov. 3, 1982). It is, however, a warning signal.[11] We agree with the district court, moreover, that § 16-21.1-3 is facially invalid for the following reason.

In deciding whether or not to grant a variance to allow a private student to be bused outside of the transportation region, the state Commissioner of Education must determine whether the sectarian school that the student wishes to attend is "similar" to a school located within the region. *See* R.I. Gen. Laws § 16-21.1-3. If the provision were limited to comparison on secular factors such as the availability of a certain sports or language program, it would raise no entanglement concerns. Testimony before the district court, however, indicated that there are no standards to guide the Commissioner's assessment of similarity, and that religion is a primary aspect of the curricula to be compared. If the Commissioner does his job, he will be required to examine the content and curricula of religious programs in order to determine whether they are similar. We are troubled by the possibility that the Commissioner would have to engage in educational and perhaps even theological hair-splitting to compare sectarian schools, especially where the schools may represent competing orders

[11] While scholars have criticized the political divisiveness test's pedigree and compatibility with representative democracy, *see, e.g., Gaffney, Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980), the Supreme Court has adhered to the test, most recently in *Larson* v. *Valente*, 50 U.S.L.W. 4411, 4417-18 (Apr. 21, 1982), where the Court struck down a Minnesota charitable solicitation statute on Establishment Clause grounds. Whether or not political divisiveness is a useful test generally, we are persuaded that it is an appropriate check here, where a single religious faith may claim as adherents a majority of the population of the state. This is not to say, of course, that such a group will necessarilly abuse its position; only that, given the potential for abuse, checks are appropriate.

or approaches of a single faith. "This kind of state . . . evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Lemon* v. *Kurtzman*, 403 U.S.at 620; *see* L.Tribe, *American Constitutional Law* § 14-12, at 869 (1978). Moreover, even such seemingly secular items as library or drama program equality may pose religious issues, for one man's masterpiece may be another's heresy.

Although the variance provision is invalid, we are persuaded that it is severable from the other portions of the statute. Under the general rules concerning severability, the otherwise valid portion of a statute can stand if it is fully operative and there is no showing that the legislature would not have enacted the valid provisions independently. *United States* v. *Jackson*, 390 U.S. 570 (1968). *See also Chartier Real Estate Co.* v. *Chafee*, 101 R.I. 544, 225 A.2d 766 (1967) (remainder need not fall where voided section is not indispensable to the other parts of the act). Here, the variance provision was a minor part of the statutory scheme applicable to a relatively small number of students. In view of the legislature's overriding concern with the health and safety of school children, we are persuaded that it would have enacted the other provisions on busing indpendently. In any event, there has been no showing to the contrary.

We therefore affirm the judgment of the district court insofar as it declared the variance provision of R.I. Gen. Laws § 16-21.1-3 invalid as infringing the Establishment Clause of the First Amendment. As to the rest of the district court's judgment we reverse. Although this is a close case, we conclude that the district court's insistence on equal access to interdistrict busing cannot stand in the face of the controlling Supreme Court precedents.

Affirmed in part, reversed in part.

BREYER, *Circuit Judge* (concurring). After considerable debate and reflection all members of this panel have agreed that (with one minor exception) the Rhode Island statute is constitutional. The careful and conscientious opinion of the majority reflects the fact that we have all found this a difficult case. Given the difficulty and the work and thought that the majority's opinion reflects, I am tempted to join it. But I do not do so because there remains a disagreement that I believe is significant. In essence, the majority holds that, while it is technically bound by a minor precedent to reverse, the law, in logic and spirit, really runs to the contrary. Indeed, the majority writes that, were it not for the letter of this unargued Supreme Court case, namely, *Springfield School District* v. *Department of Education*, 483 Pa. 539, 397 A.2d 1154, *appeal dismissed for want of a substantial federal question sub nom. School District of Pittsburgh* v. *Department of Education*, 443 U.S. 901 (1979), it would affirm the decision of the district court. *Members of the Jamestown School Committee* v. *Schmidt*, 525 F. Supp. 1045 (D.R.I. 1981). But I do not agree that this panel's result rests upon so slender a precedential reed. Moreover, I believe the Establishment Clause calls for a more "practical" approach to this type of problem than the comparatively "theoretical" approach taken by the district court and the majority of this panel. Since the court's opinion invites reconsideration of *Springfield*, it seems appropriate to explain why I believe the district court is wrong in holding the Rhode Island statute unconstitutional.

The Supreme Court in *Everson* v. *Board of Education*, 330 U.S. 1. (1947) specifically held that the Establishment Clause of the United States Constitution does *not* forbid a state ("as a part of a general program." *id.* at 17) to pay for transporting school children to Catholic, as well as to public, schools. The Court reasoned that a law that provides for transporting school children is a law that promotes "the welfare of the general public," *id.* at 14, much like a law that provides

"ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," *id.* at 17-18. As such, the Court held that it was not the type of law "which is designed to support institutions which teach religion." *Id.* at 14. This principle is clearly enunciated in *Everson*. It has been clearly applied in many later cases (*see, e.g., Cromwell Property Owners Association, Inc.* v. *Toffolon*, 495 F. Supp. 915 (D. Conn. 1979) (very similar issue to that in case at bar); *Bennett* v. *Kline*, 486 F. Supp. 36 (E.D. Pa.) (same), *aff'd*, 633 F.2d 209 (3d Cir. 1980) (without published opinion); *Snyder* v. *Town of Newton*, 147 Conn. 374, 377-79, 161 A.2d 770, 772-73 (constitutionality of busing upheld even though transportation to private schools created "some additional expense to the town") *appeal dismissed for want of a substantial federal question*, 365 U.S. 299 (1961); *West Morris Regional Board of Education* v. *Sills*, 58 N.J. 464, 279 A.2d 609 (busing within specified cost limit for students to private schools up to twenty miles away upheld), *cert. denied*, 404 U.S. 986 (1971): *Springfield School District* v. *Department of Education*, *supra; Rhodes* v. *Abington Township School District*, 424 Pa. 202, 220, 226 A.2d 53, 64 (1967) (constitutionality of busing for private school children upheld even if parochial schools receive indirect financial benefit from busing), *appeal dismissed for want of a substantial federal question*, 389 U.S. 11 (1967); *State ex rel. Hughes* v. *Board of Education*, 154 W. Va. 107, 174, S.E.2d 711 (1970), *appeal dismissed and cert. denied*, 403 U.S. 944 (1971)). In my view the district court's decision is wrong, not simply because it conflicts with the disposition of the *Springfield* case, but because it is inconsistent with several aspects of this more firmly established principle.

First, the record does not reveal any significant favoritism of "religions as against nonbelievers" in theory or in practice. *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961). The district court found a *theoretical* favoritism (presumably sufficient to

warrant a finding of unconstitutionality, *see, e.g., Wolman* v. *Walter*, 433 U.S. 229, 254 (1977) (field trip program held unconstitutional because of "unacceptable risk of fostering of religion")) in the fact that Catholic School students have a greater right to transportation outside "school districts" than do public school students. But this fact is irrelevant for the purposes of finding a *theoretical* favoritism, for the "school districts" that the court discussed are *public* school districts, the boundaries of which were drawn with *public* schools rather than parochial schools in mind. It is hardly surprising that each Catholic school is not located in the center of each *public* school district. A program that seeks approximately equal or even absolutely identical treatment for Catholic and public school students will likely transport some Catholic school students across public school district boundaries. Presumably, some public school students will be taken across Catholic school boundaries (if such boundaries exist) as well. It is simply not possible for a *theoretical* inequality to arise only from the fact that busing will take some private school students across public school boundaries.

The matter would have been very different had the district court found, as a *practical* instead of a *theoretical* matter, that Catholic schools obtain a disproportionate benefit because they serve students from regions that are significantly larger than the local school districts. But the record suggests the contrary. The defendants offered evidence which suggests that no matter how the problem is viewed, the Catholic schools receive no practical advantage. According to this data, in 1978-1979 the state transported nearly 90,000 public school students and about 8,300 religious school students. It apparently paid over $10 million for public school transportation, but merely a little more than $850,000 for religious school transportation. In fact, if one focuses only upon students who were bused outside their local *public* school districts, one finds that more *public* school students were bused (2,864) than religious school students (1,154). And (perhaps

because many public school students transported across district lines were handicapped children) the total inter-district public school transportation bill was $2 million while inter-district parochial school busing cost less than $125,000.

The most relevant figure, however, is the transportation cost per pupil. The defendant's figures suggest that the cost per pupil for transportation *within public* school districts was $100 per public school student and $102 per parochial school student; the cost per pupil for transportation *outside* the public school districts was $108 per parochial school student but $702 per public school student (perhaps reflecting the cost of busing handicapped students). Taking all (inter- and intra-district) transportation costs together, the state's cost amounted to about $120 per public school pupil and $103 per religious school pupil.

These figures are not inherently implausible. In fact, they are fully consistent with the hypothesis that Catholic students live, on average, a bit further from their schools than public school students. After all, in a small state like Rhode Island per pupil transport costs may be more a function of the extent to which an individual bus is filled with students than of the distance traveled.

The district court did not "accord these figures great weight," primarily because the "survey provide[d] no information as to how the reported costs were calculated." *Members of the Jamestown School Committee* v. *Schmidt*, 525 F. Supp. at 1050. The court also noted that in some areas a school had to pay much more for transporting students to a particular Catholic school than to a public school. But the district court did not decide this case on the ground of practical advantage or significant difference in transport costs. To the contrary, it apparently accepted the defendant's figures *arguendo*, and held that, while it was somewhat more expensive to bus religious school students outside public school districts than to bus public school students within public school districts, how much this difference might be was "unimportant." *Id.* at 1051.

The statewide dollar differences in per pupil expenditures of the sort introduced in this case, however, could not support a conclusion that this law, as a practical matter, impermissibly favors Catholic schools over public schools. The differences are *de minimis*. It would be impossible for a state to create a system guaranteed to produce absolute equality of costs. Indeed, the state's figures could reflect far greater disparities before they came close to the type of favoritism that has been held to cause a constitutional problem. *See, e.g., Springfield School District* v. *Department of Education*, 483 Pa. at 558 n.9, 397 A.2d at 1164 n.9 ("A constitutional consideration would arise only if the cost of transportation for the students attending sectarian schools was so disproportionate that it became apparent that the transportation provided to the public school youngster was merely a ruse to confer a benefit to the sectarian school pupil."); *Bennett* v. *Kline*, 486 F. Supp. at 39 (adopting *Springfield* rationale); *Cromwell Property Owners Association, Inc.* v. *Toffolon*, 495 F. Supp. at 923 ("At some point, the cost of inter-district transportation for students attending sectarian schools may become so grossly disproportionate compared to the ordinary expense of public school busing that the 'indirect' benefits in regionalization accruing to sectarian institutions will rise to a constitutionally significant level."). The cost differentials in isolated cases, while possibly relevant, prove little in and of themselves, for in other isolated instances public school busing is presumably more expensive than private. The issue at stake is the effect of the plan as a whole; police protection does not become unconstitutional because in one precinct it is unusually expensive to protect a church, nor fire protection because in one neighborhood the church alone is made of wood. The district court's uncertainy about comparative costs would warrant at the most further factual development were the matter more questionable.

Second, the transportation statute is neutral on its face. It divides the state into regions and provides that:

> A pupil attending a school, including a public school, vocational school, special education program . . ., a consolidated school . . .,a regional school . . ., or a non-public non-profit school . . . shall be provided with bus transportation to the school or facility which the pupil attends, within the region in which the pupil resides . . . .

R.I. Gen. Laws § 16-21.1-2 (1981). Can a court find this statute unconstitutional simply because it can find another statute (setting up public school districts) which, in combination with the transportation statute, creates what it (wrongly, in my view) conceives as a *theoretical* advantage for Catholics? Does a fire department violate the Establishment Clause if it buys equipment tall enough to reach a church dome if zoning laws make the equipment unnecessary for other buildings? If so, and more important for purposes of this case, does the Establishment Clause strike down general laws that would authorize such expenditures *even if in fact the dome is no higher than other buildings?* My point is that, if the Esablishment Clause strikes down such an "expenditure" law, it must do so because *in fact* the law will lead to disproportionately large expenditures favoring religious institutions, not because there is a theoretical possibility it could do so at some other time or in some other place.

Third, there are other practical considerations. AS lons as *Everson* is the law, proportionate state expenditure on school transportation is support for child safety rather than support for the church. *See Everson* v. *Board of Education*, 330 U.S. at 18. If so, there ought to be a feasible way for a state to do what it has a right to do—namely, to draft a statute that pays for transportation proportionately. Rhode Island's experience thus far suggests that this is easier said than done. And, one

might test the more "theoretical" approach by asking what, if the statute were unconstitutional, the legislature here *ought* to have done? Should it have confined Rhode Island's Catholic school students to public school districts, even though many districts contain no Catholic schools? Should it have bused a student to the border of such a district, where the children can walk across the boundary and board the next district's bus? Should it have provided that Catholic students can be bused only to those Catholic schools that happen to be located in the *middle* of a public school district? Should it have said that school children who attend a Catholic school that happens to be located on the boundary between public school districts A and B be bused if they live in A, but not B; or that they can be bused if they live in either district but must travel on separate (and hence more expensive) buses so that neither bus crosses the district line? The fact that it is difficult to think of a statute that would satisfy the approach of the district court and the fact that plausible statutory solutions seem arbitrary or only tangentially related to any serious Establishment Clause objective suggest that the more "theoretical" approach is wrong. If *Everson* is right, there should be a way to apply it in Rhode Island.

Fourth, I am concerned, here as elsewhere, about the practice of combining several different statutes to find in the combination a theoretical preference, which is then held unconstitutional. In *Usher* v. *Schweiker*, 666 F.2d 652, 661-62 (1st Cir. 1981), we pointed out that the Equal Protection Clause does not automatically invalidate a statute simply because that statute can be combined with another to produce a result that seems unfair or even irrational. Rather, given the vast number of laws, rules and regulations, any absolute "rational total net result" requirement, as applied to possible combinations of different laws, is unworkable and would make legislating too difficult. The same is true here. It is easy to think of laws that might combine with transportation,

police or fire protection statutes to produce theoretical advantages for religious institutions. A state law may end the public school day at 4:00 p.m., giving Catholic school students the theoretical right to take buses at different (and more expensive) times. A state law may place public schools in safer areas of the city, making police protection for private religious schools potentially more costly. A state law may require public schools to be built of fire-proof material, making fire protection for religious schools potentially more expensive. The problems engendered by combining different statutes and then asking whether, in theory, the combination gives Catholic students something their public school counterparts are denied are not ones that rise in this case to a constitutional level. The ease with which statutes can be combined to produce possible differences suggests that a court should examine the significance of these differences *in practice*.

For these reasons, unlike the majority of this panel, I do not find it surprising that the Supreme Court dismissed *Springfield* for want of a substantial federal question. Nor am I surprised that other cases have followed *Springfield*. *See e.g.*, *Cromwell Property Owners Association, Inc.* v. *Toffolon, supra; Bennett* v. *Kline, supra*. Indeed, Justice Black in *Everson* noted that the state could have required "a local transit company to provide reduced fares to school children including those attending parochial schools, or . . . a municipally owned transportation system [could have] undertake[n] to carry all school children free of charge." These schemes would have been fully as constitutional as the plan the state did adopt, he explained, for the denial of such services was "obviously not the purpose of the First Amendment." *Everson* v. *Board of Education*, 330 U.S. at 17-18; *see Wolman* v. *Walter*, 433 U.S. at 253 (reaffirming validity of illustration). Yet, the Justice made no calculation of per pupil costs, and mentioned no maps of school district lines—even though local trolley lines rarely pay heed to school district boundaries. The First Amendment, after all,

is impartial. It plays no favorites between public and private school students, and that impartiality implies that it not penalize parochial school students on the basis of public school district lines. It is possible for expenditures for a neutral purpose like school transport to be weighted too heavily in favor of religious school students and thus to offend the Constitution. However, the question of constitutionality in such a case is primarily a question of practical effect, measured in terms of costs incurred by the state and actual benefit conferred on the parochial school student. No unconstitutional practical effect has been demonstrated here. For this reason, and not simply because of the Supreme Court's dismissal of the *Springfield* case, I agree with the court's result.

I also agree that § 16-21.1-3 (providing for busing to a school outside a student's region where "there is no similar school within the region") is unconstitutional. In giving the Rhode Island commissioner of education the authority to examine the religious content of a private school's curriculum and then to make judgments about the propriety of busing based on that examination, the section entangles church and state in a manner that the Establishment Clause was designed to prevent.

The Supreme Court has severely limited a court's power to intervene in religious disputes, even to decide property matters. *See Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U.S. 440 (1969) (courts may not consider theological issues when resolving property disputes between religious bodies). *See* Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680 (1969). Of course the "wall between church and state," *Everson* v. *Board of Education*, 330 U.S. at 18, is not absolute. A state may, for instance, inspect religious schools to see that they meet the state's educational standards. *See Board of Education* v. *Allen*, 392 U.S. 236, 246 n. 7 (1968). Similarly, it may provide textbooks to religious school students, despite the

consquent risks of entanglement. *See id.* at 244-45; *Wolman* v. *Walter*, 433 U.S. at 236-38; *Meek* v. *Pittenger*, 421 U.S. 349 (1975). *See generally* Freund, *supra*. Yet, it is difficult in this case to find any strong educational or other reason to have the state's commissioner of education examine the theological orientation of one religious school to determine whether a student is entitled to inter-regional busing to attend another. The Rhode Island legislature should be able to redraft this severable section to limit inter-regional busing in a less intrusive way.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 82-1081

MEMBERS OF THE JAMESTOWN SCHOOL COMMITTEE, ET AL.,

PLAINTIFFS, APPELLEES,

v.

DR. THOMAS C. SCHMIDT, AS COMMISSIONER OF EDUCATION OF THE STATE OF RHODE ISLAND, ET AL.,

DEFENDANTS, APPELLANTS.

ON PETITION FOR REHEARING

ENTERED: MARCH 10, 1983

Before

COFFIN, *Chief Judge*,

ROSENN* and BREYER, *Circuit Judges*.

Appellees in their petition for rehearing challenge our rejection of cost comparisons between intra-district busing of public students and inter-district busing of sectarian students, asserting that intra-district busing of sectarian students is not challenged, that public students in the general curriculum are rarely bused outside their home districts, and that cost comparisons of public and sectarian student busing *as a whole* are therefore unnecessary. As a result, appellees contend, the court has overlooked what they claim is constitutionally significant evidence on the relative cost of sectarian student busing. More specifically, appellees note that in Warwick, the

* Of the Third Circuit, sitting by designation.

school committee pays only $84.27 per student per year for intra-district busing of public students, versus $121.83 and $1436.28 per student per year for inter-district busing to two sectarian schools.

As to their larger point, appellees exaggerate the unimportance of inter-district public student busing: in the Jamestown district itself, for example, public high school students, like their sectarian counterparts, *all* attend schools outside the district, for the Jamestown district maintains no high school of its own. While the number of such public students statewide may be comparatively small, such busing is constitutionally relevant, and appellees have not shown that it is so trivial as to be de minimis. Similarly, appellees offer no valid reason to single out inter-district busing for sole scrutiny. As we observed in the opinion of the court, "if sectarian students may constitutionally be bused at public expense to their schools, wherever located, the relevant comparison would seem to be between the relative costs per student of public and sectarian busing *as a whole*." If appellees have framed their suit on different assumptions, it is up to them to reframe their suit, and not for us to rewrite the constitution.

As for appellees' figures from Warwick, they are fully noted in the opinion of the court, and are flawed for the reasons discussed above. We add only that we also question the propriety of cost comparisons between public busing *generally* and busing to *particular* sectarian schools. As for the other cost evidence in the record, our review persuades us that appellees' evidence was as hotly disputed as the statewide survey submitted by appellants and criticized by the district court. Without additional specific findings by the district court, or a clearer record, we have no basis for finding unconstitutional disparities in cost.

Finally, appellees attack our reliance on the U.S. Supreme Court's summary dispositions in *Springfield School Dist.* v.

Pennsylvania Dept. of Educ., 483 Pa. 539, 397 A.2d 1154, *dismissed for want of a substantial federal question sub nom. School Dist. of Pittsburgh* v. *Pennsylvania Dept. of Educ.*, 443 U.S. 901 (1979), and two other cases out of Pennsylvania. We repeat: to understand the significance of the three decisions, it is necessary to analyze the jurisdictional statements before the U.S. Supreme Court. Appellees fail to make such analysis.

The petition for rehearing is therefore denied.

By the Court,
s/DANA H. GALLUP
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT,
D. RHODE ISLAND

Civ. A. No. 77-0511

MEMBERS OF the JAMESTOWN SCHOOL COMMITTEE, ET AL.,

v.

Dr. Thomas C. SCHMIDT, et al.

Amato A. DeLuca, Warwick, R.I., for plaintiffs.
Richard Woolley, Dept. of Atty. Gen., Providence, R.I., for defendants.

OPINION
Oct. 23, 1981

PETTINE, *Chief Judge*.

This case presents another challenge to a Rhode Island statute providing bus transportation beyond school district limits to nonpublic school children. Rhode Island's previous statutory program in this area was invalidated in *Members of the Jamestown School Committee* v. *Schmidt*, 427 F.Supp. 1338 (D.R.I.1977) (hereinafter referred to as *Jamestown I*). This case raises similar legal questions.

Plaintiffs in this action are several federal, state and local taxpayers, and two organizations, the Rhode Island affiliate of the American Civil Liberties Union, Inc. and Americans United For Separation of Church and State, who are suing on their own behalf, and on behalf of their members. It is undisputed that plaintiffs have standing to challenge expenditures under this statute as violations of the Establishment

Clause. This court has jurisdiction in this case under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) for a cause of action arising under 42 U.S.C. § 1983.

This Court in *Jamestown I* held that R.I. G.L. § 16-21-2 violated the Establishment Clause of the First Amendment made applicable to the states under the Fourteenth Amendment. Following that decision, the Rhode Island General Assembly enacted R.I.G.L. §§ 16-21.1-1 *et seq.*, entitled "Transportation of School Pupils Beyond City and Town Limits."[1] This statute divides the state into five transportation

[1] The statute reads in full:

TRANSPORTATION OF SCHOOL PUPILS
BEYOND CITY AND TOWN LIMITS

16-21.1-1. General purposes.—This chapter shall be construed and applied to create a state plan for the busing of pupils beyond city or town limits, in recognition of the legislative policy to encourage the establishment of and continuance of consolidated and regional schools, to provide a unified statewide busing service, to afford to pupils who attend public schools the opportunity at the election of the school committee of the city or town in which the pupils reside, to attend a public school, either full time or part time, outside of the city of town which provides a program or curriculum not available within the city or town in which the pupil resides, as authorized by § 16-3.1-1, et seq., to afford to handicapped children equal educational opportunity, to afford bus transportation to pupils who attend non-public non-profit schools which are consolidated, regionalized or otherwise established to serve residents of a specific area within the state, and who may be counted for purposes [of] reimbursement to cities and towns under the state aid formula provided by § 16-7-22, et seq., to conserve valuable natural resources by reducing the number of vehicles necessary to transport pupils to school, and, to provide for the transportation of public school students who attend schools located outside of the city or town in which they reside, to protect the health, safety and welfare of pupils who live at such distances from the schools which they attend as to make it impractical or hazardous to require the pupil to walk to school.

16-21.1-2. School bus districts established.—There are hereby established school bus districts within the state to provide bus transportation in the interest of public safety, health and welfare for pupils in grades kindergarten through grade twelve (12), or in special education programs, who attend public schools, including vocational schools and special education programs provided in accord with regulations of the Rhode Island state board of regents for education, consolidated schools established under the provisions

regions, and requires local school committees to provide free bus transportation to and from school within such regions for any pupil who attends:

> a school, including a public school, vocational school, special education program provided in accord with regulations of the Rhode Island state board of regents for

---

of [§ 16-10-1], regional schools established under the provisions of § 16-10-1, et seq., or who participate in cooperative programs as provided by § 16-3.1-1, et seq., and non-public non-profit schools which are consolidated, regionalized or otherwise established to serve residents of a specific area within the state which schools satisfy the requirements of law for any of the grades of school, kindergarten through grade twelve (12) as follows:

Region I The towns of Burrillville, North Smithfield, and Cumberland, and the city of Woonsocket

Region II The county of Kent, except the town of West Greenwich and the town of Foster, Glocester and Scituate

Region III The towns of Lincoln, Smithfield, Johnston, North Providence, Barrington, Warren and Bristol and the cities of Cranston, Central Falls, East Providence, Pawtucket and Providence

Region IV The county of Washington and the towns of Jamestown and West Greenwich

Region V The town of Little Compton, Middletown, Portsmouth and Tiverton and the city of Newport

A pupil attending a school, including a public school, vocational school, special education program provided in accord with regulations of the Rhode Island state board of regents for education, a consolidated school established under the provisions of § 16-10-1, et seq., a regional school established under the provisions of § 16-3-1, et seq., as authorized by § 16-3.1-1, et seq., or a non-public non-profit school kindergarten through grade twelve (12), consolidated, regionalized or otherwise established to serve residents of a specific area within the state for any of the grades of schools, kindergarten through grade twelve (12), in the interest of public safety, health and welfare, shall be provided with bus transportation to the school or facility which the pupil attends, within the region in which the pupil resides, by the school committee of the city or town within which the pupil resides.

16-21.1-3. Variances permitted.—Variances to require a city or town to provide bus transportation to a pupil who attends a school, except a special education facility, outside the region in which the pupil resides shall be granted by the commissioner of education if he finds that there is no similar school within the region, that such transportation is necessary to provide an educational opportunity which the pupil has a right to pursue, and that

education, a consolidated school established under the provisions of § 16-10-1, et seq., a regional school established under the provisions of § 16-3-1, et seq., as authorized by § 16-3.1-1, et seq., or a non-public non-profit school kindergarten through grade twelve (12), consolidated, regionalized or otherwise established to serve residents of a specific area within the state for any of the grades of schools, kindergarten through grade twelve (12). . . .

R.I.G.L. § 16-21.1-2.

---

the school building which the pupil attends is within fifteen (15) miles of the city or town of which the pupil is a resident.

Variances to require a city or town to provide bus transportation to a pupil entitled to enrollment [in] a special education program, provided in accord with regulations of the Rhode Island state board of regents for education, shall be granted by the commissioner of education if he finds that such transportation is necessary in order that the pupil enroll in a special education facility located outside of the region and there is no similar facility within the region.

16-21.1-4. Duties of school committees.—It shall be the duty of the respective school committees of the city or town to provide the bus transportation required by this act, either by the use of its own bus facilities and personnel or by contract. School committees may enter into such contracts as they shall deem necessary in order to accomplish the requirements of this act, and may enter into cooperative agreements with other school committees for the purposes of conforming to the requirements of this act.

16-21.1-5. Hearings—Commissioner of education.—All controversies arising out of application of any provision of this chapter shall be determined by the commissioner of education or his designated hearing officer who shall afford a hearing to the pupil and school committee concerned, and, after hearing, shall render a decision. The decision of the commissioner of education, or the grant or denial of a variance shall be final except that the pupil or school committee aggrieved by the decision or grant or denial of a variance, shall have a right of appeal to the superior court which shall affirm the decision or grant or denial of a variance, shall have a right of appeal to the superior court which shall affirm the decision or grant or denial of a variance unless it is clearly erroneous or contrary to law.

16-21.1-6. Repealer.—All acts or parts of acts and all regulations relating to or providing for transportation of pupils without the city or town limits, except as provided herein, are hereby repealed and are null and void.

A student who desires transportation to a school located outside of the transportation region in which he resides may seek a variance allowing such transportation from the Commissioner of Education. The Commissioner is empowered to grant such a variance whenever he determines that "there is no similar school within the region, that such transportation is necessary to provide an education opportunity which the pupil has a right to pursue, and that the school building which the pupil attends is within fifteen (15) miles of the city or town of which the pupil is a resident." R.I.G.L. § 16-21.1-3.

The Complaint in this action, filed August 12, 1977, alleged that R.I.G.L. §§ 16-21.1-1 *et seq.* violates the Establishment Clause of the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiffs also alleged that the statute in question violated several distinct provisions of the Rhode Island Constitution. After a hearing held on September 7, 8, and October 19, 1977, the court abstained pending resolution of plaintiffs' state law claims which were certified to the Rhode Island Supreme Court. That Court held that plaintiffs' state law claims were not meritorious, but declined to construe the act in light of federal constitutional requirements. *Members of Jamestown School Committee* v. *Schmidt*, R.I., 405 A.2d 16 (1979). Thereafter further discovery ensued, and all parties eventually agreed to submit the case to the court on a record consisting of the proceedings of the initial hearing, a survey of bus transportation costs for students undertaken by the Rhode Island Department of Education in 1980, and additional testimony taken through depositions and exhibits.[2]

[1] After a careful consideration of this record, I have concluded that the present statute is essentially indistinguishable from its predecessor which was found unconstitutional in

[2] Defendants have moved to strike certain exhibits that plaintiffs attached to their Second Supplementary Post-Trial Memorandum. Because I have found for plaintiffs without considering these exhibits, I find it unnecessary to rule on this matter.

Jamestown I. I, therefore, hold that R.I.G.L. §§ 16-21.1-1 *et seq*. conflicts with the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, and must be invalidated.

[2] In analyzing the challenged statute in *Jamestown I*, this court employed the three-prong test that has become customary in Establishment Clause cases. To pass muster under the Establishment Clause a statute must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). The court in *Jamestown I* found that the statute in question there satisfied the first part of this test, inasmuch as it had the secular purpose of providing for the safe transportation of all children to school. *Id*. at 1347.

The statute in question here recites a number of secular purposes as its object. In particular, the Act states that one of its purposes is "to protect the health, safety and welfare of pupils who live at such distances from the schools which they attend as to make it impractical or hazardous to require the pupil to walk to school." R.I. G.L. § 16-21.1-1. The evidence adduced at the hearing held on this matter and in deposition testimony made a part of the record confirms that transportation of children to school by bus is the safest means of transport available. While plaintiffs allege that the unstated purpose of this legislation was to supply financial support to non-public sectarian schools, there is not support in the record for such an assertion. I therefore conclude, as I did in *Jamestown I*, that the statute here has a neutral, secular purpose.

Jamestown I concluded that the transportation scheme challenged there had the impermissible primary effect of advancing religion. The court reached this conclusion based on the United States Supreme Court's reasoning in *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed.711

(1947). There the Court held that the provision of transportation to both public and private school children *on an equal basis* was constitutionally permissible, although it represented perhaps the farthest acceptable reach of state aid in this sensitive area. *Id* at 16-17, 67 S.Ct. at 511-512; *see Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 775, 93 S.Ct. 2955, 2966, 37 L.Ed.2d 948 (1973); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971).

In *Jamestown I* this court found that the Rhode Island transportation program violated *Everson's* requirement that benefits be provided to all school children equally because school committees were required to provide private sectarian school children with options not available to public school children. *Id.* at 1347. The statutory scheme under consideration here is similarly defective. R.I.G.L. §§ 16-21.1-1 *et seq.* when analyzed does not provide equal opportunities for public and nonpublic school children to use transportation beyond school district limits. R.I.G.L. § 16-21.1-1 provides such transportation for public school children in the standard curriculum only if the school committee so elects and if the "program or curriculum is not available within a city or town." The scope of this very subjective limitation lies within the sole discretion of the local committee.[3] On the other hand, the city or town is required to bus private school children to consolidated, regionalized or schools otherwise established to serve residents of a specific area within the state, whether or not the program or curriculum is available within a city or

[3] In practice, the parties agreed that public school children in the standard curriculum are usually bussed beyond school district limits only in communities which do not operate their own schools. The statute also provides for transportation beyond school district limits for public school children enrolled in regional vocational schools or special education programs. This option remains unavailable, however, for the vast majority of public school students in the standard curriculum.

town and without any election by the local school committee to do so. In other words, nonpublic school students[4] can take advantage of the inter-district transportation provided by the Act whenever they choose to attend a regional or consolidated nonpublic school located in their transportation region. If they select a non-public school located outside of the transportation region in which they reside, they may secure transportation by obtaining a variance, provided that there is no similar school located within the transportation region and the school is within 15 miles of the city or town of which the pupil is a resident.

Nor does the requirement that the non-public school must be consolidated or regional in order to be covered by the Act constitute a substantial limitation on the options of nonpublic school students. A nonpublic school may become consolidated or regionalized merely by formal action taken by the school's governing body. It is apparent from all this that nonpublic school students enjoy transportation options under the challenged statute that are not available to public school students. The statute thus lacks the benevolent neutrality required of state action in this sensitive area, and has the constitutionally impermissible effect of advancing religion. *Jamestown I* at 1347.

In *Jamestown I* the greater options enjoyed by nonpublic school students were particularly troublesome because they were provided at substantially greater cost to local taxpayers.[5] *Id.* at 1347. The defendants in this case argue that additional

---

[4] Approximately 85% of the students who attend nonpublic schools in Rhode Island are enrolled in sectarian schools which provide at least some religious education. In 1978-79, 94% of the nonpublic school students bussed outside of their school districts attended religiously affiliated schools.

[5] In *Jamestown I* the court observed that the relative cost of the benefits provided to public and sectarian school children was a relevant, but not dispositive consideration. The court assumed that "the Establishment Clause can countenance differing costs of transportation provided within a school district." *Id.* at 1348 n.11. I continue to adhere to that view today.

cost data obtained subsequent to *Jamestown I* suggest that there is no substantial disparity between the cost of bussing nonpublic school students beyond school district limits and bussing public school children within school districts. They have submitted the results of a 1979-80 Department of Education survey in which all school districts were requested to supply data on the cost and number of students bussed in 1978-79. The survey indicates that for the year in question it cost $108 per student/per year to transport 1,154 school children to religiously affiliated schools located beyond school district limits, while it cost $100 per student/per year to transport 85,405 public school students to local public schools.

The court, however, cannot accord these figures great weight because of problems associated with the survey. First, I note that the data collected by the survey are incomplete inasmuch as 23 school districts, for reasons not explained in the record, failed to submit figures for nonpublic school children bussed outside of the school district. Second, and of greater importance, the survey provides no information as to how the reported costs were calculated. It is therefore difficult to assess how accurate the survey is in determining the actual costs for the transportation of students.

I note that the parties had the opportunity to explore in detail the costs of transportation for particular school districts through the taking of depositions. This testimony reveals that in some instances it is substantially more expensive to transport nonpublic school students outside of the school district than it is to provide transport to public school students within the school district. In Warwick, for instance, it costs the local school committee $84.27 per student/per year for the bussing of public school students within the local school district, while transportation of students to Our Lady of Mercy and Solomon Schecter Schools, both sectarian schools located outside of the school district, costs $121.83 per student/per year and $1,436.28 per student/per year respectively.

On balance, it is clear that it is more expensive to bus non-public school students to religious schools outside the school district than it is to bus public school students to their local schools. How much more expensive it is, is uncertain, but it is also unimportant. Given the fact that sectarian school children enjoy greater options at greater public expense than their public school counterparts, the statute is constitutionally infirm.

It is worth observing that R.I.G.L. §§ 16-21.1-1 *et seq.* has been enacted at a time when public expenditure for edcucation of the young faces more serious limitations than perhaps at any other time in recent history. Evidence adduced at the hearing and depositions taken in this matter indicates that school budgets have been pared to the limit. At the same time, local school committees are being required to fund expensive transportation options for children who have chosen to attend a regionalized sectarian school.

The benefits that such religious schools derive from this program are obvious. The free transportation permits the religious schools to attract students from towns and cities located at greater distances from the school at no cost to the institution for transportation. This in turn facilitates the process of regionalization which results in greater revenues and reduced operating expenses for the church.[6] In short, R.I.G.L. §§ 16-21.1-1 *et seq.*, like its predecessor in *Jamestown I*, "has the effect *in fact* of transferring a major cost of regionalization from parents seeking to provide their children a religious education, and the religious bodies themselves, to the taxpayers of the state. This the legislature may not do." *Jamestown I* at 1348.

In *Jamestown I* the statute under consideration was also found to create an excessive entanglement of church and state

[6] Evidence produced at the hearing held in this matter indicates that one of the primary reasons for the regionalization of sectarian schools has been the need to reduce operating expenses.

in two ways. First, it necessitated a substantial increase in administrative contracts between public school and sectarian school officials in order to coordinate the details of the transportation program. Second, and of greater importance, the successive and very likely permanent annual appropriations required by the program created an unacceptable risk of "political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect." *Id.* at 1349, quoting *Meek* v. *Pittenger*, 421 U.S. 349, 372, 95 S.Ct. 1753, 1767, 44 L.Ed.2d 217 (1975).

I find that this statute is similarly flawed. There is evidence that the transportation program created by this statute requires significant administrative interaction between public school and sectarian school officials in order to provide for proper scheduling and routing of busses, necessary adjustments for holidays or special events, and so forth. Public school officials must also contact sectarian school personnel in order to deal with discipline problems that occur on the school busses.

The state also interacts with the church in two other ways under this statute. First, the Commissioner of Education must determine from time to time if a particular sectarian school is "consolidated, regionalized or otherwise established to serve residents of a specific area within the state" so as to come within the coverage of the Act. *See* R.I.G.L. § 16-21.1-2. Second, in deciding whether or not to grant a variance, the Commissioner may be called upon to evaluate whether a sectarian school located outside the transportation region is similar to another sectarian school located within the region. *See* R.I.G.L. § 16-21.1-3. Such governmental evaluation of religious practices and institutions is precisely the sort of church-state entanglement which the Establishment Clause prohibits. *See Walz* v. *Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970); L. Tribe, *American Constitutional Law* 869 (1978).

This statute also creates a serious danger of causing political division along religious lines. The funding of inter-district transportation to sectarian schools remains as much of a political issue in Jamestown as it was at the time of *Jamestown I*. Disturbing incidents have also occurred in South Kingstown and Newport. Approximately a year ago, South Kingstown school officials proposed eliminating several busses that were transporting school children to Monsignor Clarke, a sectarian school. The school officials sought instead to transport these children to Monsignor Clarke using busses that also were carrying older public school students. A delegation consisting of 75 angry parents, as well as the principal and some teachers from Monsignor Clarke, appeared at a school committee meeting and protested vehemently that their group was not receiving their fair share of benefits due them as taxpayers. The school committee eventually retracted its proposal, and decided to adjust public school schedules in order to accommodate the needs of Monsignor Clarke. It should be noted that this incident involved a dispute over transportation of nonpublic school students within a school district. But the potential for political divisiveness is equally present with the inter-district bussing of nonpublic school students which involves even greater expense to the school district.

In Newport the school committee entertained a proposal to eliminate bus transportation for grades 7 through 12 for all public, private and parochial schools. A large group of parents of parochial school children, including the Chairman of the School Board for the Newport County Regional Catholic School, appeared at a school committee to protest this measure, which was subsequently defeated. It is worth noting that shortly thereafter several parents of public school children protested to the school committee that their children were not receiving bus transportation under a new school committee policy, while such transportation was being provided to children in private and parochial schools.

All of this indicates that the potential for political fragmentation along religious lines inherent in this statute has to some extent already been realized. The United States Supreme Court has observed that "...while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored." *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 797-98, 93 S.Ct. 2955, 2977-2978, 37 L.Ed.2d 948 (1973). That warning signal cannot be ignored in this case.

The entanglement factor also serves to distinguish this case from *Springfield School District* v. *Department of Education*, 483 Pa. 539, 397 A.2d 1154 (1979), *appeal dismissed for want of substantial federal question*, 443 U.S. 901, 99 S.Ct. 3091, 61 L.Ed.2d 869 (1979) and *Cromwell Property Owners Association, Inc.* v. *Toffolon*, 495 F.Supp. 915 (D. Conn.1979), two cases decided after *Jamestown I*. While both cases upheld statutes that provided transportation to nonpublic school students beyond school district limits, the cases are factually distinguishable from the case at bar because there was no evidence of political division along religious lines in either case. *See Springfield School District*, 397 A.2d at 1166-67 n.15; *Toffolon* 495 F.Supp. at 925. In this case, that important warning signal is all too present.[7]

II

[3,4] Plaintiffs are entitled to a declaratory judgment that R.I.G.L. §§ 16-21.1-1 *et seq.* as applied to the transportation of nonpublic school students is unconstitutional.[8] 28 U.S.C.

[7] Because I find the statutory scheme to be violative of the Establishment Clause, I need not reach plaintiffs' other constitutional claims.

[8] The court finds that the statute's provisions with respect to the transportation of nonpublic school children are severable from the remainder of the statute. Whether constitutionally acceptable provisions of a statute are severable from provisions found constitutionally infirm depends on legis-

§§ 2201 and 2202. The court is also of the opinion that plaintiffs are entitled to injunctive relief. Unlike the case in *Jamestown I*, where the court declined to issue an injunction because none of plaintiffs' tax contributions were being used to fund the unconstitutional transportation of nonpublic school students beyond school district limits, some of the plaintiffs in the case at bar are taxpayers of North Kingstown, North Providence, and Pawtucket, all of which bus nonpublic school children outside of their respective school districts. These plaintiffs thus face the prospect of irreparable harm and are entitled to an injunction. Because a new school year has recently commenced, it is necessary to enjoin the unconstitutional transportation found here as rapidly as possible without causing undue disruption in the state's transportation system or unnecessary hardship to nonpublic school students. Consistent with these concerns, counsel for both parties are requested to confer and to submit within 30 days a draft order enjoining defendants from using or authorizing the use of public funds for the transportation of nonpublic school students beyond school district limits.

---

lative intent. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Commission of the State of Oklahoma*, 286 U.S. 210, 234, 52 S.Ct. 559, 564-565, 76 L.Ed. 1062 (1932). The absence of a severability clause is in no way dispositive. *United States* v. *Jackson*, 390 U.S. 570, 585 n.27, 88 S.Ct. 1209, 1218 n.27, 20 L.Ed.2d 138 (1968). Prior to the enactment of R.I.G.L. §§ 16-21.1-1 *et seq.*, separate statutes provided for the transportation beyond school district limits of public school students in regional vocational schools and special education programs. *See Jamestown I* at 1343. I conclude from this that the Rhode Island General Assembly would have enacted the provisions of R.I.G.L. § 16-21.1-1 pertaining to the transportation of public school students independently of the provisions with respect to nonpublic school students. The two parts of the statute are therefore severable. This opinion does not affect the transportation of public school children in nonsectarian Regional Vocational Schools and special education programs.

APPENDIX D

United States District Court
For the District of Rhode Island

C.A. File No. 77-0511

MEMBERS OF THE JAMESTOWN SCHOOL COMMITTEE, ET AL.,

v.

DR. THOMAS C. SCHMIDT, ET AL.

JUDGMENT

This action came on for trial before the Court, Honorable Raymond Pettine, Chief District Court Judge, presiding. The issues were duly tried and a written decision rendered on October 23, 1981. After a chambers conference on November 25, 1981, the Court determined that the originally specified thirty (30) day period from issuance of the written decision to entry of Judgment was insufficient to allow for orderly adjustment of busing programs which will take place to comply with this Judgment. Accordingly, the Court extended the effective date of this Judgment as per paragraph 4 of this Judgment, notwithstanding plaintiffs' objections to such an extension. The Court recognizes that this extension will diminish the harm to the defendants and public caused by the adjustment of busing programs which will take place to comply with this Judgment. It is therefore

ORDERED AND ADJUDGED:

1. That Rhode Island General Laws § 16-21.1-1, *et seq.*, as applied to the transportation of non-public school students to schools located outside the boundaries of the school districts within which the students reside, violates the Establishment Clause of the First Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment of the United States Constitution.

2. That the Defendants are permanently restrained and enjoined from directly or indirectly spending or authorizing, pursuant to Rhode Island General Laws § 16-21.1-1, *et seq.*, the expenditure of any state funds to provide for, or to reimburse, any municipality, school district, school committee or municipal dpeartment or agency for transportation, which takes place subsequent to the effective date of this Judgment, or non-public school students to schools located outside the boundaries of the school district within which the student resides. The transportation of public school children to non-sectarian regional vocational schools and special education programs is exempted from the restraints imposed by this paragraph.

3. Defendants are permanently restrained and enjoined from taking any action, either directly or indirectly, to enforce these provisions of Rhode Island General Laws § 16-21.1-1, *et seq.*, as applied to the transportation of non-public school students to schools located outside the boundaries of the school district within which the student resides.

4. To provide for minimum disruption of present school busing programs, the provisions of this Judgment shall take effect on the day following the last day of the first semester of the 1981-82 school year.

Nunc pro tunc as of November 23, 1981.

BY ORDER: ILLEGIBLE
Clerk

ENTER: RAYMOND J. PETTINE
Chief Judge

DATE: 12/2/81

CERTIFICATION

I hereby certify that on this 2nd day of December, 1981, I forwarded a true copy of the within document to counsel as follows:

Amato DeLuca, Esq.
946 Centreville Road
Warwick, R.I. 02886

APPENDIX E

CHAPTER 21
HEALTH AND SAFETY OF PUPILS

SECTION.		SECTION.	
16-21-1.	Transportation of public and private school pupils.	16-21-10, 16-21-11.	[Repealed.]
16-21-2.	[Repealed.]	16-21-12.	Dental treatment provided by town.
16-21-3.	Standards for school buildings.	16-21-13.	Open air schools.
16-21-4.	Fire drills required-Failure to comply.	16-21-14.	Hearing, speech and vision examinations—Records—Statewide hearing screening and conservation program.
16-21-5.	Uniform fire code or drill tactics—Reports.	16-21-15.	Eye protective devices.
16-21-6.	[Repealed.]	16-21-16.	Students suspected of narcotic addiction.
16-21-7.	School health program.		
16-21-8.	Certified nurse-teacher.		
16.21-9.	Health and dental examinations-Reports—Records.		

16-21-1. Transportation of public and private school pupils. — The school committee of any town shall provide suitable transportation to and from school for pupils attending public and private schools of elementary and high school grades, except such private schools as are operated for profit, who reside so far from the public or private school which the pupil attends as to make the pupil's regular attendance at school impractical and for any pupil whose regular attendance would otherwise be impracticable on account of physical disability or infirmity.

CHAPTER 21.1

TRANSPORTATION OF SCHOOL PUPILS BEYOND CITY AND TOWN LIMITS

SECTION.		SECTION.	
16-21.1-1.	General purposes.	16-21.1-5.	Hearings—Commissioner of education.
16-21.1-2.	School bus districts established.	16-21.1-6.	Repealer.
16-21.1-3.	Variances permitted.		
16-21.1-4.	Duties of school committees.		

16-21.1-1. General Purposes.—This chapter shall be construed and applied to create a state plan for the busing of pupils beyond city or town limits, in recognition of the legislative policy to encourage the establishment of and continuance of consolidated and regional schools, to provide a unified statewide busing service, to afford to pupils who attend public schools the opportunity at the election of the school committee of the city or town in which the pupils reside, to attend a public school either full time or part time, outside of the city or town which provides a program or curriculum not available within the city or town in which the pupil resides, as authorized by § 16-3.1-1, et seq., to afford to handicapped children equal educational opportunity, to afford bus transportation to pupils who attend non-public non-profit schools which are consolidated, regionalized or otherwise established to serve residents of a specific area within the state, and who may be counted for purposes of reimbursement to cities and towns under the state aid formula provided by § 16-7-22, et seq., to conserve valuable natural resources by reducing the number of vehicles necessary to transport pupils to school, and, to provide for the transportation of public school students who attend schools located outside of the city or town in which they reside, to protect the health, safety and

welfare of pupils who live at such distances from the schools which they attend as to make it impractical or hazardous to require the pupil to walk to school.

16-21.1-2. School bus districts established.—There are hereby established school bus districts within the state to provide bus transportation in the interest of public safety, health and welfare for pupils in grades kindergarten through grade twelve (12), or in special education programs, who attend public schools, including vocational schools and special education programs provided in accord with regulations of the Rhode Island state board of regents for education, consolidated schools, regional schools established under the provisions of § 16-3-1, et seq., or who participate in cooperative programs as provided by § 16.3.1-1, et seq., and non-public non-profit schools which are consolidated, regionalized or otherwise established to serve residents of a specific area within the state which schools satisfy the requirements of law for any of the grades of school, kindergarten through grade twelve (12) as follows:

Region I The towns of Burrillville, North Smithfield, and Cumberland, and the city of Woonsocket

Region II The county of Kent, except the town of West Greenwich and the towns of Foster, Glocester, and Scituate

Region III The towns of Lincoln, Smithfield, Johnston, North Providence, Barrington, Warren and Bristol and the cities of Cranston, Central Falls, East Providence, Pawtucket and Providence

Region IV The county of Washington and the towns of Jamestown and West Greenwich

Region V The towns of Little Compton, Middletown, Portsmouth and Tiverton and the city of Newport

A pupil attending a school, including a public school, vocational school, special education program provided in accord with regulations of the Rhode Island state board of regents for education, a consolidated school established under the provi-

sions of § 16-10-1, et seq., a regional school established under the provisions of § 16-3-1, et seq., as authorized by § 16-3.1-1, et seq., or a non-public non-profit school kindergarten through grade twelve (12), consolidated, regionalized or otherwise established to serve residents of a specific area within the state for any of the grades of schools, kindergarten through grade twelve (12), in the interest of public safety, health and welfare, shall be provided with bus transportation to the school or facility which the pupil attends, within the region in which the pupil resides, by the school committee of the city or town within which the pupil resides.

16-21.1-3. Variances permitted.—Variances to require a city or town to provide bus transportation to a pupil who attends a school, except a special education facility, outside the region in which the pupil resides shall be granted by the commissioner of education if he finds that there is no similar school within the region, that such transportation is necessary to provide an educational opportunity which the pupil has a right to pursue, and that the school building which the pupil attends is within fifteen (15) miles of the city or town of which the pupil is a resident.

Variances to require a city or town to provide bus transportation to a pupil entitled to enrollment in a special education program, provided in accord with regulations of the Rhode Island state board of regents for education, shall be granted by the commissioner of education if he finds that such transportation is necessary in order that the pupil enroll in a special education facility located outside of the region and there is no similar facility within the region.

16-21.1-4. Duties of school committees.—It shall be the duty of the respective school committees of the city or town to provide the bus transportation required by this chapter, either by the use of its own bus facilities and personnel or by contract. School committees may enter into such contracts as they shall deem necessary in order to accomplish the requirements

of this chapter, and may enter into cooperative agreements with other school committees for the purposes of conforming to the requirements of this chapter.

16-21.1-5. Hearings—Commissioner of education.—All controversies arising out of application of any provision of this chapter shall be determined by the commissioner of education or his designated hearing officer who shall afford a hearing to the pupil and school committee concerned, and, after hearing, shall render a decision. The decision of the commissioner of education, or the grant or denial of a variance shall be final except that the pupil or school committee aggrieved by the decision or grant or denial of a variance, shall have a right of appeal to the superior court which shall affirm the decision or grant or denial of a variance unless it is clearly erroneous or contrary to law.

16-21.1-6. Repealer.—All acts or parts of acts and all regulations relating to or providing for transportation of pupils without the city or town limits, except as provided herein, are hereby repealed and are null and void.